DOCUMENT RESUME

ED 107 181 HE 006 561

AUTHOR	Young, D. Parker, Ed.
TITLE	Higher Education: The Law and Parameter for Action. Proceedings.
INSTITUTION	Georgia Univ., Athens. Inst. of Higher Education.
PUB DATE	2 Jul 74
NOTE	68p.; Report from a conference sponsored by the Institute for Higher Education and the Center for Continuing Education (University of Georgia Center for Continuing Education, July, 1974)
AVAILABLE FROM	Institute of Higher Education, University of Georgia, Athens, Georgia
EDRS PRICE	MF-$0.76 HC-$3.32 PLUS POSTAGE
DESCRIPTORS	Collective Bargaining; *Court Litigation; *Decision Making; *Employment Practices; *Higher Education; *Legal Problems; Racial Discrimination; Student Costs; Tuition
IDENTIFIERS	*Affirmative Action Plan

ABSTRACT

The central purpose of the conference was to present and discuss judicial decisions and trends and their implications for and applications to the posture of academic decision making. The issues of concern were questioned and examined not from a philosophical or sociological point of view but in light of court decisions and precedents. The document covers: (1) Desegregation: Higher Education's Responsibilities; (2) Public-Private Distinctions: Are There Any Left?; (3) Student Fees: Activities and Non-Resident Tuition; (4) Collective Bargaining in Higher Education; (5) Problems or Opportunities for the College or University in Achieving Its Affirmative Action Obligations as an Employer of Academic and Other Professionals; (6) Affirmative Action: Federal Laws and Regulations Relating to Students. (Author/KE)

ED107181

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Proceedings

HIGHER EDUCATION: THE LAW AND PARAMETERS FOR ACTION

Edited by

D. Parker Young

Sponsored by

The University of Georgia
Institute of Higher Education
Center for Continuing Education

July 1–2, 1974

The University of Georgia Center for Continuing Education / Athens

HE 006 561

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INTRODUCTION

The campus is no longer a battleground. The shouts of the sixties are but echoes in the mind and on the bookshelf. On the bookshelf, too, however, in rapidly increasing numbers are the reports of new confrontations--sophisticated skirmishes now being fought in the courtroom, the hearing room, the arbitration room. The scene has shifted. The tempo of activity is both more deliberate and more resolute. The action now involving institutions of higher education is largely that which the institutions must engage in to meet the standards of the courts and of statutes with accompanying guidelines. Parameters within which administrators must be prepared to act and to react are emerging.

These emerging parameters were the concerns of the conference "Higher Education: The Law and Parameters for Action." The conference was sponsored jointly by the Institute of Higher Education and the Center for Continuing Education and held at the University of Georgia Center for Continuing Education on July 1–2, 1974. The central purpose of the conference was to present and discuss judicial decisions and trends and their implications for and applications to the posture of academic decision making. The issues of concern were questioned and examined not from a philosophical or sociological point of view but in light of court decisions and precedents. The topics discussed by the conference speakers are the subject of this publication.

Dean LeMarquis DeJarmon, speaking on "Desegregation--Higher Education's Responsibility," traces the legal battles fought around the issue of providing equal educational opportunities for blacks. Early emphasis was on two factors: first, that a state could not restrict its black citizens to historically black institutions exclusively and, second, that a state was obligated to provide the same type of educational opportunity to blacks as to its other citizens and within its borders. In the wake of **Brown** (1954) and the Civil Rights Act of 1964, efforts at desegregating higher education were assessed in terms of "body count," and formulas were advanced that required equalization of per pupil expenditure, alteration of attendance patterns, and other quantifiable changes. Now, a decade after the Civil Rights Act, the evolution of the law seems to have brought us to the point where demands and expectations are geared more to concerns of quality and not "just numbers and quotas of integration." Indeed, the clarification of institutional role and the implementation of that role within a long-range master plan now seem the keys to progress, suggests Dean DeJarmon.

Dean Donald Gehring posits, "A meaningful legal distinction still exists between public and private institutions. The essence of that distinction is the Fourteenth Amendment and the Civil Rights Act of 1871. Those laws require the states and individuals acting under color of state law to comply with the requirements of the Constitution and laws of the United States. Public institutions obviously are agencies of the state and must therefore afford students all rights, privileges, and immunities outlined in the Constitution. Private institutions are under no such obligation unless it can be shown that the state has insinuated itself to a significant extent in the conduct of the private institution for which redress is sought." Dean Gehring warns, however, that "the loss of institutional autonomy is a gradual process and each 'state action' finding chips away at that independence." If private institutions fail to provide to their students the full range of constitutional rights, the legal distinctions between public and private institutions may not long continue.

In the area of student activity fees, I observe that administration officials have rather wide discretion as to use of student activity fees and, in the absence of arbitrary or capricious exercise of discretion, courts will not interfere. Generally, the courts have upheld the collection and expenditure of these funds at the college level so long as (1) they are not used for purposes which are illegal, non-educational, or supportive of any religious or particular political or personal philosophy and (2) there is equal access to the funds.

The lowering of the age of majority holds great implications in the area of student residency. If students can gain legal residence status and out-of-state tuition is therefore eliminated, then the financial loss to institutions of higher education will be great. The issue has recently be litigated in many states, and courts have generally followed the United States Supreme Court (in **Vlandis** v. **Kline**) in ruling that a student must be allowed to present evidence that he is a bona fide resident. However, reasonable durational residency requirements have been upheld.

J. David Kerr, University Counsel, Central Michigan University, describes collective bargaining as a decision-making process that effects everyone within the institution. Those employees--be they faculty or food-service workers--choosing to form "bargaining units" will be directly affected, and all others will keep a watchful eye upon those who organize. He discusses the issues and concerns which arise when bargaining comes to campus. Stressing the relationship that exists between the institution and the union, Kerr states, "In the final analysis the union must either be accepted or rejected. If the union is accepted, it does make sense to build a relationship which will be constructive and lend to problem solving. If an administration attempts to reject a union when clearly the employees in the bargaining unit have accepted it, its attitude can only lead to constant friction." Institutions must "hold out the welcome mat" in an effort to make collective bargaining mean collective progress.

Robert D. Bickel, University Attorney, Florida State University, considers the problems and opportunities of affirmative action in employment. "Although," he suggests, "the college or university may not continue to insist upon the 'best qualified' or 'most qualified' academic professional employee or, in some instances, even upon the terminal degree requirement without risking noncompliance with affirmative action mandates under the executive order and applicable federal regulations, it may continue to insist upon certain standards . . . which must be met . . . with the likelihood that the federal courts will be reluctant to interfere with such standards and would indeed be supportive of the university's right to determine such standards (and the relationship between the standards and successful performance in the position to which the standards are applied)."

Jean K. Parker addresses, first, the "reverse discrimination" question raised in **DeFunis** v. **Odegaard**: "To obtain racial balance may an educational institution constitutionally admit minority students who are less qualified academically than rejected non-minority candidates?" While foreseeing more litigation until the question is finally answered by the Supreme Court of the United States, she suggests the immediate consideration by institutions of higher education of a single method of selecting students relying heavily upon subjective matters rather than strictly objective criteria in an effort to achieve a diversified student body.

Another area of student affirmative action--the elimination of discrimination based on sex--will profoundly affect institutions of higher education in the coming years, suggests Ms. Parker. Following a detailed consideration of the regulations proposed to effectuate Title IX of the Educational Amendments of 1972, she emphasizes, "Affirmative action is here in the student area. It is imperative that all educational institutions be aware of their responsibilities and begin to reach decisions on how to implement their own affirmative action programs within the legal guidelines established by courts, Congress, and federal agencies."

Parameters are indeed emerging. Litigation and legislation make the world of the administrator a dynamic world, a complex milieu of education that evolves as does the law. Merely to stay atop his job, the academic official must be knowledgeable of the guidelines and decisions which apply to his institution. To excel at his job, he must understand and appreciate the history behind, the law concerning, and the problems and opportunities surrounding the decisions that are daily being made. To keep administrators so informed was the purpose of our conference.

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Institute of Higher Education
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DESEGREGATION: HIGHER EDUCATION'S RESPONSIBILITIES

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The responsibility for the desegregation of higher education has taken various and twisting turns. During the mid and late 1930s the great legal battles were fought around the issue of providing equal educational opportunities for blacks at the professional level. **Pearson** v. **Maryland,**[1] the case that first projected Thurgood Marshall into the public light, which was aimed at opening up the Law School of the University of Maryland to prospective black law students, was soon followed by **Missouri** ex rel **Gaines** v. **Cannada.**[2]

These cases set the pattern for other law suits that followed--**Sipuel** v. **University of Oklahoma**[3] in 1948, **McLauren** v. **Oklahoma State Regents**[4] in 1950, **McKissick** v. **Carmichael**[5] (UNC) in 1950, and **Sweatt** v. **Painter**[6] (Texas) in 1950.

Two major factors stand out in these series of cases. First, the historically black institutions of higher education that had carried the burden of providing higher education for blacks were not condemned; there was an implicit recognition of their worth and existence. What the courts required was that the state could not restrict its black citizens to those intitutions exclusively. Second, where the black citizen chose to go to other state schools and pursue courses that were offered at one state school and not at another (as in these specific cases) the state owed a duty to provide that opportunity to the blacks at the same time that it provided that educational opportunity to other citizens within its borders. The black citizen could not be put to the additional burden of traveling beyond state lines to pursue that which the state provided to its other citizens within its borders.

In the realm of higher education I think this view was strongly recognized in a post-**Brown** v. **Board** law suit--**Hawkins** v. **Florida.**[7] When a prospective law student wished to attend the law school at the University of Florida, rather than the historically black Law School at Florida A. & M., the state of Florida, relying on the Court's declaration of **Brown** of "all deliberate speed," requested more time to study the problem. The Supreme Court summarily dismissed that plea, saying that since Hawkins was seeking professional education, he was not bound by the deliberate speed doctrine of **Brown** but instead was controlled by **Gaines, Sipuel, McLauren** and **Sweatt.**

Somewhere in the midst of modern history the distinctive lines between public education at the primary and secondary level and public education at the higher education and professional level has become **blurred** if not entirely obliterated. Ten years after **Brown,** which dealt with public primary and secondary education, the Civil Rights Act of 1964 imposed an affirmative duty upon every federal department and agency that provides financial assistance to institutions through grants, contracts, loans, etc., to assure that such institutions are operating in a non-discriminatory manner.[8]

In light of the Congressional mandate, the Supreme Court in **Green** v. **County Board**[9]

commanded that there was an affirmative duty of the states to disestablish a dual system of racially identifiable public education. Again, **Green** dealt specifically with primary and secondary education. Presumably the theory was that if the educational and psychological damages emphasized in **Brown** were corrected at that stage, the open opportunity for higher education at all the state institutions would meet the constitutional test of equal protection of the laws.

On the higher educational levels one theory was developed that was called or referred to as the proper formula for applying **Green** and **Brown** to higher education. It was advanced that in state systems of higher education, once racially segregated by law, student admission policies must be free of racial discrimination. In addition the state had the duty to:

(1) equalize per pupil expenditures on similar kinds of institutions in so far as such institutions are racially distinguishable.

(2) make positive efforts to alter present segregated attendance patterns by influencing student choice of colleges and universities through recruiting techniques.

(3) insure that the administrative staff and faculty of its institutions were desegregated.

(4) utilize expansion of facilities and new construction to gradually integrate the dual system.

Desegregation of higher education in these terms was being evaluated and often defended in terms not too much unlike the assessment and progress of the United States involvement in Indo-China--namely, "body count."

The Carnegie Commission[10] reported that in 1947 between 80 and 90 percent of all blacks who had graduated from colleges had received their education in the black institutions of the South; but with the dropping of barriers to white institutions and the migration of blacks to the North, the percentage of blacks enrolled in historically black colleges dropped from 51 percent in the fall of 1964 to 36 percent in the fall of 1968. Yet blacks as a group prize education as much as any group in the United States. This is evidenced by the survival to this day of fifty-three private black educational institutions from among the hundreds of such institutions established since the Civil War.

Segregation initially made separate existence mandatory; but separatism was **never** and is **not now** the major driving force behind black institutions. Indeed, initially the majority of the faculty in black colleges was **white,** and most still have a substantial number of whites on their faculties and a few in their student bodies.

These institutions serve several functions in the black culture, particularly where they are primarily **controlled** and **operated** by blacks. They provide and present cultural models for aspiring black **youth,** demonstrating that blacks can not only manage and operate important affairs but also succeed and achieve, notwithstanding oppressed and disadvantaged backgrounds. Secondly, for cultural and psycho-social reasons, they provide and present educational settings which many blacks find congenial and truly prefer to attend.

It has been the genius of United States history that every underprivileged group which sought to advance and ascend has had educational institutions with which the members of that group could comfortably, easily, and readily identify. With the filing of **Adams** v. **Richardson** on October 19, 1974, to force HEW to enforce Title VI with respect to higher education as well as elementary and secondary education, these historical facts began to receive less recognition.

In fact, while the **Adams** v. **Richardson** case was in preparation, the Acting Director of the Office of Civil Rights, HEW, was interviewed by Mrs. Ruby G. Martin of the Washington Research Project on what Title VI requires of a statewide system regarding higher education and the role of the historical black institutions. Some of the questions and answers of this interview are quite revealing.

Q: Does Title VI give OCR the authority to require as an essential part of the desegregation plan that all usable facilities for all the institutions be utilized?

A: While Title VI does not give the OCR specific authority to require the use of certain facilities under a desegregation plan, Title VI does give OCR authority to prohibit the closing of an otherwise good facility if evidence indicates that the closing:

(1) is racially motivated
(2) falls more heavily on one race than on the other, or
(3) will result in denying one race equal educational opportunity.

Q: Does Title VI give OCR the authority to require as an essential feature of an acceptable desegregation plan any racial balance or specific percentage of Black administrators and professional staff at each or any of the higher educational facilities?

A: Title VI gives OCR **no** authority to require any racial balance as specific percentage of Black administrators or professional staff. OCR does have the authority to assure that Black administrators and professional staff do not bear the entire burden of the process of desegregation.

While the office does not have authority to require a specific balance, it does have authority to require equity.

Q: Does Title VI authorize OCR to require, as an integral part of any acceptable plan, the protection of some of the concerns of Black students, alumni and the Black community; e.g., maintaining the name of the traditionally Black institutions, assuring that Blacks continue to assume positions such as presidents etc. of institutions.

A: Title VI does not protect against many of the fears and concerns of Blacks. It does not authorize OCR to render plans unacceptable because it changed the name, character or emphasis of traditionally Black intitutions unless there is proof (a heavy burden to sustain) that such changes are racially motivated and would deny equal educational opportunity.

Indeed, the first opinion of Judge Pratt of the District Court of District of Columbia followed the same line of reasoning. In his mandatory injunction which required ten Southern and border states to submit desegregation plans, no mention was made of the role of the black institutions of higher education. Incidentally, these ten states are the sites of practically all the black institutions of higher education.

An amici curiae brief filed by the deans of the four remaining historically black law schools, on behalf of the presidents of one hundred historically black colleges and universities, brought the omission to the attention of the Court of Appeals of the District of Columbia sitting en banc. The appeals court specifically referred to this amici position and remanded the case to Judge Pratt, the trial judge, to reconsider portions of the law suit.

Following this remand of the case, which by now was sub-nom **Adams** v. **Weinberger,** HEW, through Peter Holmes, Director of the Office of Civil Rights, sent a letter to Governor James Holshouser of North Carolina requesting—

I. Number and quality of faculty and administrative staff. (Equality in the number of faculty would be demonstrated by the faculty-student ratios in similar programs at comparable institutions. Equality in quality would be indicated by a comparison of faculty by rank and highest degree earned in similar programs at comparable institutions. Equality in compensation should also be measured.)

II. The revised plan should also commit the Boards to a procedure to measure and monitor all construction to insure that new construction at the predominantly black institutions is not lower in quality than that at the predominantly white institutions.

III. The revised plan should contain a statement of the role of each institution in non-racial terms which includes: (1) a summary of the progress offered, (2) the students to be served, (3) opportunities provided by the programs for employment or further education. The area from which students are drawn should be identified and the institution should be characterized as local, regional or state-wide. Where one or more predominantly black and white institutions are located in the same area, there should be sufficient differentiation in their roles to ensure increased enrollment at each institution by students of the race previously excluded.

The roles of the predominantly black colleges must be ones which will attract students of all educational backgrounds and races competitively with other institutions, and which will not limit career choices for those students who chose to attend.

Your plan also mentions (p. 200), that within the next 12 months you will have developed, within the **Long Range Plan** for the higher education system of North Carolina, the future role of all institutions in the University of North Carolina system, and especially that of the predominantly black institutions. A description of the role of each institution was requested in our November 10, 1973, letter which asked for a revision in your Program for Equal Educational Opportunity. Therefore, the revised plan should contain at least a preliminary non-racial statement of each institution's role.

On June 21, 1974, HEW approved the revised plan for North Carolina. This approval seems to suggest that HEW is now gearing its demands and expectations more with the concerns of quality and not just numbers and quotas of integration.

Miller and Howell, in "The Myth of Neutrality in Constitutional Adjudication," 27 **University of Chicago Law Review** 661 (1960), stated:

> . . . that neutrality, save on a superficial and elementary level, is a futile quest; that should be recognized as such; and that it is more useful to search for the values that can be furthered by the judicial process than for allegedly neutral or impersonal principles which operate within that process.

FOOTNOTES

1. 182 Atl. 590 (1936).
2. 305 U. S. 337 (1938).
3. 332 U. S. 631 (1948).
4. 339 U. S. 637 (1950).
5. 341 U. S. 951 (1950).
6. 339 U. S. 629 (1950).
7. 350 U. S. 413 (1956).
8. Title VI Civil Rights Act 1964.
9. 391 U. S. 430 (1968).
10. See **The Affirmative Duty to Integrate Higher Education.**

PUBLIC–PRIVATE DISTINCTIONS: ARE THERE ANY LEFT?

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The question posed in your program which relates to the topic of this presentation is whether or not a meaningful legal distinction still exists between public and private institutions of higher education. Concomitant with this question are several assumptions. Firstly, the question assumes that in fact there exists in law a recognition of private institutions as opposed to public institutions. Secondly, the question assumes that there is a legal distinction between the two. Finally, it assumes that something has taken place to challenge that distinction, thus giving rise to the question. Before attempting to answer the question, then, it would seem beneficial to examine the assumptions, thereby gaining some perspective on the problem.

Those of you who are students of higher education are aware that the first colleges in this country were all private, founded by religious organizations who applied for and were granted charters by the king or the colonial government. These charters outlined certain purposes to be fulfilled by the institutions and were designed specifically to serve the aims of the sect as opposed to those of the crown or the colony. Of course, the colonial governments derived some benefit from the early colleges and actually supported the institutions, prompting some scholars to label these seminaries as church-state colleges.[1] They were, however, in fact private institutions deriving their "privateness" from their charters.

It was not until almost 150 years after the founding of Harvard that an institution of higher education was given birth by a state. This, of course, was the University of Georgia, chartered by the state legislature in 1785. The charter issued to this first of many state institutions was "an ingenious scheme for linking together the state government and the university under the direct management of one body."[2] As opposed to earlier colleges the charter creating the University of Georgia placed it ". . . under the watchful eye of the people's representatives, and it also gave the University a vantage point from which to argue for support."[3]

It appears, then, at least from a historical perspective, public and private institutions were two distinguishable entities. Today O'Neil defines the difference between public and private colleges and universities using the terminology of the 1964 Civil Rights Act. He defines a public institution as one which is operated by a state, state subdivision, or agency within a state. All others are private.[4]

The first real legal distinction between public and private institutions, however, came a scant thirty-four years after the founding of the University of Georgia. In 1819 the Supreme Court ruled as unconstitutional the intrusion of the state of New Hampshire into the governance and affairs of Dartmouth College. You may recall that Dartmouth was incorporated under a charter granted by the English crown, and after the Revolutionary War the state of New Hampshire attempted to alter the college's charter. Chief Justice Marshall in deciding the issue drew the distinction between public and private institutions by stating:

> Dartmouth College is really endowed by private individuals, who have bestowed their funds for the propagation of the Christian religion among

> the Indians, and for the promotion of piety and learning generally. . . . That education is an object of national concern, and a proper subject of legislation, all admit. That there may be an institution founded by government, and placed entirely under its immediate control, the officers of which would be public officers, amenable exclusively to government, none will deny. But is Dartmouth College such an institution? . . . it is no more a state instrument than a natural person exercising the same powers would be. . . . The objects of the contributors, and the incorporating acts, were the same; the promotion of Christianity, and of education generally, not the interest of New Hampshire particularly.[5]

Not only has the Supreme Court made a distinction between public and private institutions; it has also proclaimed that the fundamental theory of liberty excludes any general power of the states to standardize their children by forcing them to accept instruction from public teachers only.[6] This proclamation provides additional support for the assumption that two types of institutions--public and private--have been recognized by the courts of our land.

Since our courts have acknowledged public and private colleges and universities as separate, what then are the distinctions between them? Since the concern of this conference is legal rather than philosophical, the distinctions will be examined in the light of constitutional and statutory provisions. The statutory distinctions between public and private institutions affecting collective bargaining will, I am sure, be discussed this evening. Therefore, I am relieved of any compulsion to examine various state and federal labor statutes and recent challenges by private institutions to the authority of the National Labor Relations Board. Neither would it seem beneficial to study specifically the statute enacted to provide additional higher education facilities for public and private institutions. The **Tilton**[7] decision of the Supreme Court teaches that the government need not make a distinction between public and private institutions in its funding under the Higher Education Facilities Act. Only where the funding will be used for the construction of buildings in which religious activities will take place is the statute constitutionally offensive. Private religiously-affiliated institutions may qualify for loans under the act in order to construct facilities that will not be used for religious purposes. The most profitable pursuit of the distinctions, then, would seem to be a constitutional approach. The essence of the constitutional distinctions may be found in the Fourteenth Amendment. That amendment provides in part that:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.[8]

The **Dixon**[9] case is usually cited as the decision which included actions of state universities and colleges under the rubric of the Fourteenth Amendment. As a historical note, however, Judge Rives pointed out that the due process clause of the Fourteenth Amendment was actually applied by a county court in Pennsylvania almost seventy-five years prior to **Dixon.** In rendering its decision in **Dixon** v. **Alabama** the Fifth Circuit clearly differentiated between public and private institutions in regard to the application of Constitutional amendments. Referring to private institutions the court stated:

> Only private associations have the right to obtain a waiver of notice and hearing before depriving a member of a valuable right. And even there, the right to notice and hearing is so fundamental to the conduct of our society that the waiver must be clear and explicit . . . the relations between a student and a private university are a matter of contract . . .[10]

On the other hand, when speaking of the actions of state colleges and universities the court said:

> The State cannot condition the granting of even a privilege upon the renunciation of the constitutional right to procedural due

> process. . . . We are confident that precedent as well as a most fundamental constitutional principle support our holding that due process requires notice and some opportunity for hearing before a student at a tax-supported college is expelled for misconduct.[11]

The **Dixon** decision and a multitude of cases since then have made it abundantly clear that students attending institutions operated by the state or any of its agencies do not leave their constitutional rights at the schoolhouse gate. However, no such constitutional guarantees accrue to students attending private institutions. This fact is enhanced by the weight of the Supreme Court when it stated:

> . . . the principle has become so firmly embedded in our Constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct however discriminatory or wrongful.[12]

It now appears that the first two assumptions are valid. The courts have in fact acknowledged the very existence of two distinct educational endeavors--public, those operated by the state or its agencies; and others known as private, not operated by the state or its agencies. The line of distinction and what sets them apart seems clear at this point. Public institutions, as agencies of the state, must conform to the requirements of the Constitution. Private institutions, on the other hand, are not required to afford constitutional guarantees but only to provide a "clear and honest disclosure" since their actions are private conduct.[13]

But there was a third assumption implicit in the question posed for this topic. Something must be taking place to challenge the distinction giving rise to the very question itself. Are there any meaningful legal distinctions left?

That "something" which is taking place can best be described by the title of Bob Dylan's song "The Times They Are A Changing." Our society is becoming more complex, and the state is beginning to insinuate itself into myriad relationships with private parties. Thus, what was once a purely private act could now possibly be so immersed with the state as to make it no longer private conduct outside the purview of the Fourteenth Amendment. In the words of the Supreme Court, ". . . private conduct abridging individual rights does not violate the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it."[14] This is known as the "state action" concept. This concept has been the basis for a rather large and complex body of case law challenging the public-private distinction. Challenges, however, do not always prevail. While the challenge may give rise to the question ("Are there any meaningful legal distinctions left?"), the answer to the question must be "YES, there are!" Even one who forecasted the demise of this distinction at this very conference three years ago now admits that "it seems unlikely that this will be attained during the tenure of the present Supreme Court."[15] But one admission does not prove the point. To arrive at a fair answer requires an examination of the body of case law surrounding the issue of state action.

In most instances students who have challenged the public-private distinction have done so in the federal courts under section 1983 of Title 42. This statute is commonly known as the Civil Rights Act of 1871 and reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.[16]

While the Fourteenth Amendment is directed against the states, this legislation is designed to prevent individuals from violating constitutional rights when acting under color of state law. There

are two substantial elements in this act. The first is that a person must be shown to be acting under color of state law--the "state action" concept again. The second element is that the "state action" be specifically involved in the complained of injury.

A definition of "state action" now seems appropriate. **Words and Phrases** provides a fairly precise definition of the term as essentially actions taken by a person acting for a state or pursuant to its authority or direction or in obedience to its requirements.[17] That is a nice, clean definition! The Supreme Court, however, has labeled the task of defining this term as impossible. In its decision in the **Burton** case the Court said that "only by sifting facts and weighing circumstances can the non-obvious involvement of the State in private conduct be attributed its true significance."[18]

The results of that sifting and weighing by the courts affirm that meaningful legal distinctions still exist between public and private institutions. The few times that the courts have been inclined to step over the line that separates public and private conduct they have been faced with overwhelming indicia of state involvement.

Even in the most repugnant situations--segregation on the basis of race--the courts have often but not always found private conduct to fall within the scope of the Fourteenth Amendment. In **Burton**[19] the Supreme Court found that a restaurant leased by the State of Delaware to a private individual and located in a parking building operated by the state constituted a significant involvement by the state in private conduct. Thus, that private conduct, which amounted to segregation, was brought under the proscription of the Fourteenth Amendment. Similarly, the Fifth Circuit Court of Appeals would not permit the University of Tampa, a private institution to discriminate in its admissions policies on the basis of race.[20] Much like the **Burton** case the establishment of the University "was made possible by the use of a surplus city building and the use of other city land leased for the University purposes."[21]

In **Guillory** v. **Tulane**[22] an admissions policy similar to that at the University of Tampa was also challenged. However, in this case the district court found Tulane to be a private institution with insufficient state involvement to bring it under the proscriptions of the Fourteenth Amendment. Interestingly, Tulane, which later integrated of its own will, based its previously discriminatory policy on covenants written into Paul Tulane's bequest. The court pointed out to the university that there already existed an established constitutional principle that would not permit the courts to enforce racial restrictions in private covenants.[23]

Most civil actions involving private institutions and the "state action" concept have been brought to the courts in an attempt to enforce procedural due process rights rather than the equal protection clause. In this area too the courts have shown a predilection to preserve the public-private distinction. Students have argued that private institutions are acting under color of state law in denying them their due process rights. In their arguments they cite either singularly or in conjunction the college or university's public function,[24] special tax exemption,[25] state grants,[26] federal grants,[27] state charters,[28] powers of eminent domain,[29] state regulation of educational standards,[30] and utilization of town police as campus security officers.[31] Each of these indicia have been found by the courts to be insufficient for a finding of "state action."

Although time prohibits examining the circumstances and facts of each case, several of the arguments bear scrutiny. The "public function" argument amounts to an allegation under the principles set forth by the Supreme Court in **Marsh**[32] and **Logan Valley Plaza.**[33] Those cases deal with facilities that are so governmental in nature that the state cannot escape responsibility even though they are managed by a supposedly private agency. What students have attempted to show, then, is that the college campus has "all the characteristics of any other American town"[34] or that education is itself a government function. The Tenth Circuit disrnisses the applicability of the

Marsh and **Logan Valley Plaza** principles to colleges and universities by stating that:

> There is nothing in the logic of these cases to support the notion that the owner-employers in either case could not dismiss an employee without due process or that such action could, in any sense of the word, be deemed state action.[35]

In **Grossner** v. **Columbia** the idea that education itself was a public function was laid aside by the district court.[36]

Another argument to be considered is the receipt of federal and state funds. In terms of federal funds the argument fails on its face, since state action and not federal action is the concern of the Civil Rights Act of 1871.[37] In reference to state grants the most eloquent statement comes from Judge Frankel, who said:

> . . . receipt of money from the State is not, without a good deal more, enough to make the recipient an agency or instrumentality of the Government. Otherwise, all kinds of contractors and enterprises, increasingly dependent upon government business for much larger proportions of income than those here in question, would find themselves charged with "state action" in the performance of all kinds of functions we still consider and treat as essentially private for presently relevant purposes.[38]

The second necessary element of the Civil Rights Act needs to be considered. You may recall that this element requires that the proported "state action" be specifically involved in the complained of injury. In the words of Judge Friendly:

> The state must be involved not simply with **some** activity of the institution alleged to have inflicted injury upon the plaintiff but with **the** activity that caused the injury. Putting the point another way, the state action, not the private action, must be the subject of the complaint.[39] (emphasis added)

This is a very difficult but not impossible obstacle to overcome. The district court in Kansas pointed this out to a student who was summarily dismissed from his practice teaching assignment, denied credit for that experience, banished from the teacher education program, and thus failed to graduate as scheduled. All this occurred without a hearing.[40] The student complained that, since the State Board of Public Instruction accredited the teacher education program, the college, a private institution, was therefore acting under color of state law. The court dismissed the complaint since there was no evidence to show that the Board of Public Instruction in any way participated in any of the acts complained of or formulated the procedure or, "more accurately, the absolute lack of it," by which the student was summarily dismissed from the education department. Similar decisions have been rendered where the complained of activity has been a lack of due process and the state involvement has been financial. The granting of tax exemptions, state grants, and even powers of eminent domain do not, as a rule, so insinuate the state in the disciplining of students to justify a finding of "state action."[41]

On the other hand, **Powe** v. **Miles** teaches that "state action" in disciplinary situations would be present if the state undertakes to set policy for the control of student behavior in private institutions. This possibility was faced by the Second Circuit Court of Appeals in **Coleman** v. **Wagner**[42]—the same court which furnished the **Powe** decision. The case involved Wagner College, a private institution in New York. Several students who had staged a sit-in in the dean's office were expelled without due process. The students alleged that the State of New York had undertaken to set policy for the control of demonstrations at Wagner. The students supported their claim by referring to a New York law requiring every institution chartered in the state—both public and private—to file with the Commissioner of Education rules for the maintenance of public order on the campus and penalties for the violation of such rules. Institutions failing to comply would lose their state aid.

Judge Kaufman questioned whether or not the mere requirement for filing such rules was actually a significant state intrusion designed by the state to set policy. He said:

> One wonders whether rules and regulations consisting solely of the statement that any individual guilty of a transgression against the public order of the campus shall be required to give the Dean of the College a rose and a peppercorn on Midsummer's Day would satisfy the literal command of the statute in all respects.[43]

If, however, the rule was intended to coerce private institutions to adopt a "hard line" attitude toward protesters, then the elements of the Civil Rights Act would indeed be met. Since there were no facts supporting either view, the court remanded the case to the district court to determine the intent of the law. A similar argument was presented in the **Furumoto** case decided by the District Court in California. In that instance, however, the court was able to determine that Stanford University had not abdicated its responsibility for student discipline in favor of the state's laws. The evidence before the court clearly showed that Stanford had in fact promulgated a policy on campus disruption prior to enactment of a state law concerning student discipline.[44]

The New York Supreme Court did find the requisite "state action" involved in the dismissal of a student at Hofstra University, also a private institution.[45] The student was expelled and fined for throwing a rock through a plate glass window at the bookstore. Although the court found a multitude of state entanglements with Hofstra, for present purposes it need only be pointed out that (1) the student was never notified of the university's disciplinary procedures until he received his expulsion notice--in other words, there was no "clear and honest disclosure" by the institution--(2) the incident took place on property leased to Hofstra by the New York State Dormitory Authority, and (3) that authority had the right to require Hofstra to enforce rules covering physical damage to buildings. The court concluded that there did exist a significant intrusion by the state in the operation of Hofstra University--element number one--and that that intrusion made the state a joint participant in the denial of due process and subsequent expulsion of the student since the incident occurred on state property where the state had authority to regulate conduct--element number two.

A lot of information has been presented during the past thirty minutes, and it seems advisable to summarize at this point. A meaningful legal distinction still exists between public and private institutions. The essence of that distinction is the Fourteenth Amendment and the Civil Rights Act of 1871. Those laws require the states and individuals acting under color of state law to comply with the requirements of the Constitution and laws of the United States. Public institutions obviously are agencies of the state and must therefore afford students all rights, privileges, and immunities outlined in the Constitution. Private institutions are under no such obligation unless it can be shown that the state has insinuated itself to a significant extent in the conduct of the private institution for which redress is sought.

The concept of "state action" is, at best, a complex idea. There have been occasions where the same institution has been found to be acting under color of state law under one set of circumstances but not under another. Evidence the N.C.A.A. and Alfred University.[46]

The overwhelming evidence, however, seems clear. The courts have not been inclined to find "state action" in the conduct of private colleges and universities, thus leaving them free from the restrictions of the Constitution. However, what is legally correct and morally justified are not always congruent.

The fact that private institutions can legally deny constitutional guarantees does not justify that denial. There are some distinctions which, because of the particular aims and purposes of private institutions, should be preserved. However, to deny a student, once admitted, due process and equal protection is antithetical to the purpose of higher education itself.

It is interesting that "state action" has been found in cases where the state has required institutions to formulate policies dealing with student discipline--policies which should have already been drafted by the institutions themselves, but which because of their "privateness" they felt no need to articulate. Another fact which needs to be considered is that the loss of institutional autonomy is a gradual process and each "state action" finding chips away at that independence. To protect those aspects of your "privateness" which give flavor to your institutions and more importantly distinguish them from state colleges and universities, it would be advisable if you immediately began the task of providing the full range of constitutional rights to students. Failing this, there may not long exist any meaningful legal distinctions between public and private institutions. The choice is yours. In the words of Daniel Webster, when he argued the Dartmouth College case:

> Sir, you may destroy this little Institution; it is weak; it is in your hands! I know it is one of the lesser lights in the literary horizon of our country. You may put it out. But, if you do so, you must carry through your work! You must extinguish, one after another, all those greater lights of science which, for more than a century, have thrown their radiance over our country![47]

FOOTNOTES

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16. 42 **U.S.C.A.** 1983.
17. **Words and Phrases.** West Publishing Company, 40, 1964, p. 26.
18. **Burton,** supra.
19. **Id.**
20. **Hammond** v. **University of Tampa,** 344 F. 2d 951 (5th Cir. 1965).
21. **Id.**

22. **Guillory** v. **Administrators of the Tulane University of Louisiana**, 212 F. Supp. 674, (E.D. Louisiana, 1962).

23. **McLeod** v. **College of Artesia**, 312 F. Supp. 498 (D. New Mexico, 1970); **Grossner** v. **The Trustees of Columbia University**, 287 F. Supp. 535 (S.D.N.Y. 1968); **Powe** v. **Miles**, 407 F. 2d. 73 (2nd Cir. 1968); **Counts** v. **Voorhees**, 312 F. Supp. 598 (D.S.C. 1970).

24. **Grossner**, supra.

25. **Browns** v. **Mitchell**, 409 F. 2d. 593 (10th Cir. 1969); **Furumoto** v. **Lyman**, 362 F. Supp. 1267 (N.D. Cal. 1973).

26. **Grossner**, supra. **Grafton** v. **Brooklyn Law School**, 478 F. 2d. 1137 (2nd Cir. 1973). **Powe**, supra.

27. **Greene** v. **Howard University**, 271 F. Supp. 609 (D. Columbia, 1967). **Torres** v. **Puerto Rico Junior College**, 298 F. Supp. 458 (D. Puerto Rico, 1969). **Blackburn** v. **Fisk** 443 F. 2d. 121 (6th Cir. 1971). **Counts**, supra. **Grossner**, supra.

28. **Furumoto**, supra.

29. **Furumoto**, supra.

30. **Blackburn**, supra. **Rowe** v. **Chandler**, 332 F. Supp. 336 (D. Kansas, 1971). **Powe**, supra.

31. **Robinson** v. **Davis**, 447 F. 2d. 753 (4th Cir. 1971).

32. **Marsh** v. **Alabama**, 326 U. S. 501 (1946).

33. **Amalgamated Food Employees Union Local 590** v. **Logan Valley Plaza, Inc.** 391 U. S. 308 (1968).

34. **Marsh**, supra.

35. **Browns**, supra.

36. **Grossner**, supra.

37. **Counts**, supra.

38. **Grossner**, supra.

39. **Powe**, supra.

40. **Rowe**, supra.

41. See notes 25, 26, 27 and 29.

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STUDENT FEES: ACTIVITIES AND NON-RESIDENT TUITION

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In no place in our society has the struggle for the rights of individuals been more intense than on our college and university campuses. But no matter how intense that struggle has been, or may be in the future, there can be no stopping it, for in words which paraphrase those of Victor Hugo, "Nothing is more powerful than an idea whose time has come."[1] And the idea that the Constitution should follow students to the campus has now been accepted by the courts, and the results have been revolutionary.

During the past dozen years administrators in higher education have been faced with action on the part of students--action which took the form of protest and which many times became violent. As a result of that action we in higher education were forced to recognize that the Constitution did indeed accompany the students when they came on campus. Such rights as due process, both procedural and substantive, were recognized by the courts as applicable to the college setting, and many cases have been litigated which continually attempt to define that concept by the "gradual process of judicial inclusion and exclusion."[2]

Also, students have pressed for and received recognition that the First Amendment freedoms of speech and expression also apply to the campus setting. Although freedom of speech and assembly are not absolute, we have seen the courts protect those freedoms as expressed by students so long as they do not substantially interfere with the on-going activities of the institution, interfere with the rights of others, or engage in the destruction of property.[3]

But now in the summer of 1974 the action on the part of students has quieted somewhat, and the battleground has largely shifted from the campus to the courtroom. The action that is now occurring on campus is largely that which the institutions themselves must engage in to meet the standards of the courts and of statutes with the accompanying guidelines.

With nothing sacred or immune from challenge any longer, students are now questioning various specific policies and practices, and they are primarily challenging these in court. With practically all of our colleges now filled with adult students who are probably more concerned with their finances than ever before, any policy or administrative decision or practice which affects their pocketbooks is carefully scrutinized. One such challenge which has been joined by the students is that of charging various student fees other than for tuition. Of the many types of fees that are charged students, the two which are resisted more by students than any other are the mandatory activity fee and the out-of-state tuition fee.

First let us look at the activity fee as it is being utilized today in many institutions. Probably most colleges and universities in this country either collect, or authorize the student government association to collect, a general fee which goes to support various activities which are "more or less" related to the education program. I say "more or less" because some are indeed related directly to "the free marketplace of ideas" in that student newspapers and various programs and speakers are

financed by the fee and are aimed at exposing the entire student body to a broad spectrum of philosophical, political, social, and economic thought. Usually, various groups and organizations on campus are allowed to request funds to pay for such programs and speakers which they wish to sponsor. Other activities which the fee supports are somewhat less educationally related. These would include such things as health services, admission to athletic contests, a copy of the yearbook, and various social activities--just to name a few.

Today's student, however, is rebelling against the idea of having to pay for any activity which he or she perceives as not being directly related to the classroom. It is being charged that these funds are usually allowed to be disbursed by special interest groups who are simply promoting their own social and political viewpoints with very little accountability or auditing present. It is also charged that the funds go primarily toward male athletics while a "widow's mite" finds it way to female athletics. These students charge that such fees ought to be voluntary and that the various activities ought to become self-supporting, and these students claim that a majority of all students agree with them.

The issue has been joined in the courts and is continually being litigated in state after state. Based upon a review of court cases[4] and attorneys' general opinions,[5] it appears that administrative officials have rather wide discretion as to the use of student activity fees and, in the absence of arbitrary or capricious exercise of that discretion, courts will not interfere. It may be said that the governing board of an institution has final authority in authorizing student activity fees and in determining the legitimate activities which such fees support. However, administration officials may not absolve themselves of their responsibilities as to the control and supervision of the expenditures of these funds. Generally the courts have upheld the collection and expenditure of these funds at the college level so long as they are not used for purposes which are illegal, non-educational, or supportive of any religion or particular political or personal philosophy and where there is equal access to the funds. It is interesting to note, however, that the courts are not disposed toward upholding such a practice in elementary and secondary schools.[6]

Of the numerous cases which have been decided concerning activity fees at the college level, I have selected for specific mention two which seem to summarize the law as it presently exists in this area. The first case, **Lace** v. **University of Vermont,**[7] was decided by the Supreme Court of Vermont in 1973. In this case, the University of Vermont and State Agricultural College charged a $21.50 student activity fee as a condition of enrollment. The fee was collected by the university and then transferred to the accounts of various campus organizations. The allocation of these funds was determined by a student association from requests it received from the various campus organizations. Several students who objected to how the funds were spent requested a county court to issue a declaratory judgment on the basis that the mandatory fee unconstitutionally obligated them to support radical causes. Their objections were primarily that the funds were supporting the speakers bureau, the campus newspaper, and the film series which they claimed were repugnant to "loyal and patriotic citizens." The county court found a mandatory student activity fee to be in violation of the due process clause of the Vermont and the United States Constitutions and ordered the trustees of the university to assume control over the distribution of the student activity fee which had been previously controlled by the student senate and the budget committee of the student association. The university appealed.

The issue of the case was whether or not a state college or university may charge a mandatory student activity fee when part of the fee is used to support campus organizations and activities repugnant to certain segments of the student body. The court ruled affirmatively.

In reversing the county court decision, the Supreme Court pointed out that the campus must remain a "free marketplace of ideas." Simply because certain ideas are controversial and disagreeable does not necessarily make them non-educational. Furthermore, the Court stated,

". . . the plaintiffs do not show that they were denied equal and proportional access to the same student association funds utilized by student organizations to advocate 'positions and views with which they wholly disagree' in order to advocate positions and views with which they wholly agree." There was also no showing that the university forbid the plaintiff students the opportunity to make their views known to others in the campus community.

The second case I have selected for special mention is **Veed** v. **Schwartzkopf**,[8] which was decided by the United States District Court in Nebraska in 1973. The facts of this case show that the University of Nebraska, as a condition of enrollment, requires students to pay a $31.50 activity fee each semester. Part of the fee supports the campus newspaper, the speakers program of the Nebraska University, and the student government association of the university. A student at the university brought this action to challenge the constitutionality of the mandatory nature of the fee since he opposed the philosophy of many of the speakers brought to campus and the editorial policy of the newspaper. He contended that the mandatory nature of the fee forced him to become associated with philosophies repugnant to his own, thus violating his constitutional rights of freedom of speech, religion, press, and association.

The issue of this case was whether or not a state university or college is constitutionally prohibited from assessing mandatory student fees to provide a forum for the expression of political and personal opinions. The court said "no" and declared: "The difficulty with the plaintiff's (student) position is that it assumes a fact which finds no support in the evidence: that in its program of supporting extra-curricular speakers and a student newspaper, the university assumes the role of advocate for the particular philosophy expressed by the speakers and the newspaper." The evidence established no association by the university with the philosophy expressed by any speakers or by the campus newspaper, and indeed no form of editorial or other censorship was exercised by the university. Insofar as such activities are concerned, the university's educational program in this case extended permissibly beyond that which takes place in formal classroom instruction and provided students with a broad range of ideas within a variety of contexts, included in which were the student government association of the university, the speaker program, and the campus newspaper. The court pointed out that "whether such activities are, in fact, educational in nature is for the Board of Regents to determine, subject only to the limitations that the determination be not arbitrary or capricious and that it not have the effect of imposing upon the student the acceptance or practice of religious, political, or personal views repugnant to him or chilling his exercise of his constitutional rights." None of these were violated by the university.

The court then declared that "the plaintiff has remained free to associate himself with those political, religious and personal philosophies which most closely conform to his own." Finally, it was the firm view of the court that "our states through their colleges and universities must retain the freedom and flexibility to put before their students a broad range of ideas in a variety of contexts."

This decision was affirmed without an opinion by the Federal Court of Appeals.[9] It was then taken to the United States Supreme Court,[10] which refused to grant a writ of certiorari, which had the practical effect of upholding the lower court's decision.

It is not a legal requirement that institutions sponsor many of the activities for which student fees support. As students increasingly question the collection of mandatory fees which are used by various student organizations for programs and speakers, as well as for student newspapers, admission to athletic and social events, etc., it seems likely that more institutions will simply offer such goods and services on a voluntary freedom of choice basis in which the activities are self-supporting. I think we will continue to see more institutions getting out of the student newspaper business. As a result, an increasing number of institutional "house organs" will probably be initiated. This publication would be an official organ for purposes of information,

announcements, policy statements, and interpretation of official policy. Student newspapers, as well as other independent or "underground papers," will continue to enjoy the constitutional protection they now enjoy. The difference, of course, is that they will have to survive in the marketplace of the financial world. I also think that it is likely that more institutions will simply cease to recognize officially any student organizations--thereby avoiding the problem of an appearance of approving some of their activities which may be politically unpopular.

I now want to turn our attention to the out-of-state, or non-resident, tuition fee. As I indicated earlier, most college students today are legal adults as a result of a lowered age of majority in approximately four-fifths of the states; and the legal implication of student independence is probably most significant in the area of "residency" of a student relative to out-of-state tuition charges. College students as adults may now be able to obtain a legal residence in the state where they attend college and thereby avoid the higher out-of-state tuition payments.

The ability to gain legal residency in a state has tremendous implications insofar as finances are concerned. Out-of-state tuition may be eliminated in a great many instances if a student is able to obtain a legal residence in the state in which the college or university is located.[11] If students can easily gain legal residence status and the out-of-state tuition is therefore eliminated, then the financial loss to the institution will have to be compensated by other means. Tuition fees will probably be higher, and this will tend to limit educational opportunities within a state for many who may not be able to afford the increased costs.

The United States Supreme Court, last year, in **Vlandis** v. **Kline**[12] held that the due process clause does not permit a state (Connecticut in this case) to deny an individual the opportunity to present evidence that he is a bona fide resident entitled to in-state rates, on the basis of a permanent and irrebuttable presumption of nonresidence, when that presumption is not necessarily or universally true in fact, and when the state has reasonable alternative means of making the crucial determination. The Court stated:

> Our holding today should in no wise be taken to mean that Connecticut must classify the students in its university system as residents, for purposes of tuition and fees, just because they go to school there. Nor should our decision be construed to deny a State the right to impose on a student, as one element in demonstrating bona fide residence, a reasonable durational residency requirement, which can be met while in student status. We fully recognize that a State has a legitimate interest in protecting and preserving the quality of its colleges and universities and the right of its own bona fide residents to attend such intitutions on a preferential tuition basis.
>
> We hold only that a permanent irrebuttable presumption of non-residence--the means adopted by Connecticut to preserve that legitimate interest--is violative of the Due Process Clause, because it provides no opportunity for students who applied from out of State to demonstrate that they have become bona fide Connecticut residents. The State can establish such reasonable criteria for in-state status as to make virtually certain that students who are not, in fact, bona fide residents of the State, but who have come there solely for educational purposes, cannot take advantage of the in-state rates.[13]

The appellees in the case did not challenge, nor did the Court invalidate, the option of the state to classify students as resident and non-resident students, thereby obligating nonresident students to pay higher tuition and fees than do bona fide residents. The Court even suggested that relevant criteria in determining in-state status could include year-round residence, voter registration, place of filing tax returns, property ownership, drivers license, car registration, marital status, vacation employment, etc.

Some individuals have been of the opinion that a reasonable durational residency requirement could be no more than several months at most, but several exemplary cases show otherwise. A federal court[14] in Texas upheld a Texas statute which provides for the classification of a student as a non-resident for tuition purposes until he has resided within the state for a full year. A federal

court[15] in Hawaii upheld a twelve-month residency requirement before a student could apply for in-state tuition rates. And just this past December, the United States Supreme Court[16] upheld a University of Washington regulation which imposes a one-year residency requirement before being eligible for in-state tuition. In that case students who were classified as nonresidents for tuition purposes at the University of Washington brought suit in federal court[17] challenging certain Washington State statutes which impose a one-year durational residency requirement in order to qualify as residents for tuition purposes. Under the statutes a resident student is defined as one who has: ". . . (a) established a bona fide domicile in the State of Washington for other than educational purposes, and (b) established and maintained that domiciliary status for more than one year immediately preceding the commencement of the first day of the school term for which he registered at the State's institution of higher learning." The students claimed that they had established a domicile in the state of Washington but that the statutes required that for one year they be treated differently from other residents of the state. Thus, they claimed that "for no compelling state reason" they are deprived of their equal protection rights. They also contended that the statutes violated their constitutional rights to travel as well as due process of law. In defense of the statutes it was asserted that a rational basis exists for the classification, since such a classification partially achieved a cost equalization.

The court ruled that the right to a higher education is not a fundamental right and therefore "the exacting standards of the compelling state interest test are not applicable" but instead "must be viewed in the light of the traditional equal protection standard, i.e., is there a rational, reasonable, relevant distinction between the differentiated classes?" The court declared that there is a rational basis for the classification since the purpose of the differentiation:

> . . . is to afford residents of this State who have resided here for more than one year immediately preceding the commencement of the school term an opportunity to attend the University at a cost subsidized by the taxpayers of the State, while charging those who have not theretofore contributed tax dollars to the State the actual cost to the State of their education. The one-year waiting period thus serves to provide the State with a time period during which it may charge a realistic tuition rate in order to achieve a partial cost equalization.

Therefore, the legislation is constitutional.

As I stated earlier, this decision was affirmed by the United States Supreme Court in a Memorandum Decision. Actually, virtually the same requirement in Minnesota was upheld by the high Court[18] in 1971. It should be pointed out that when new circumstances have arisen which may demonstrate that a student is now entitled to a change in status, and the university procedures provide for a determination of such status, he is obligated to reapply prior to resorting to court action.[19]

It remains to be seen what financial effect those decisions will have upon higher education. It appears obvious from the court decisions that a year's residence requirement while in student status may be the maximum time that out-of-state students can be kept in that category before allowing them the opportunity to prove in-state status. Whether large numbers of students will take advantage of this opportunity is an unknown factor. However, I think that it is safe to conclude that the potential loss of revenue to public institutions is substantial.

I would like to point out that residency for voting purposes should not be equated with residency for tuition purposes. A decision has just recently been rendered by the Federal District Court in Kentucky[20] which upholds this view. The United States Supreme Court[21] has declared that voting is a fundamental right which cannot be abridged while education has not been recognized as such. In the Kentucky case, a student at Kentucky State University who was registered to vote in the state of Kentucky was classified as a nonresident for tuition purposes by the university. The student brought suit against the university on the basis that a determination of domicile by the voting

authorities is binding upon the university and thus classifying student-voters as non-residents is constitutionally impermissible.

The Court presented an excellent review of various legal writings and court decisions addressing the question of whether or not " 'domicile' bears a fixed meaning and composition for all applications." The Court summarized its review by stating, "These authorities manifest that domicile is not susceptible to a rigid arbitrary definition. The term will display varying hues as its application shifts. Consequently, there is no reason to presume that a determination of domicile by voting authorities has binding effect upon college officials." The Court further noted that although voting is one of several relevant factors to be considered in attempting to ascertain a person's domicile for a particular purpose, it is not the sole or controlling factor. In addition, the Court went further by indicating that even if the meaning of domicile were unitary the state could still classify persons for certain purposes without violating the equal protection clause of the Constitution. The tests for a state-imposed classification were then examined by the Court, which reasoned that dissimilar treatment is not unconstitutional unless it affects a right of constitutional quality. The Court further reasoned that where the right abridged is not a fundamental constitutional right the state need not demonstrate that its disparate classification of persons as residents and nonresidents was both related to a rational purpose and promoting of a compelling state interest. The tests being met by the state, the Court said, "The practice here attacked is not constitutionally proscribed."

It is now clear that out-of-state students may be so classified for a reasonable period of time--probably one year--before they may apply for resident status and be charged higher tuition fees during that time. But there is little doubt that students will continue to demand that any fee required of them be justified on the basis that it is related to the educational program. The term "accountability" has been worn thin by use in the past few years, but that concept has now become firmly entrenched in what is now a buyers market in higher education. Those colleges and universities which ignore this do so at their peril.

FOOTNOTES

1. In **Histoire d'un Crime: Conclusion: La Chute** (Ch. 10, p. 649; Ed. Nationale, Paris, 1893, Vol. 36). Translated literally, Hugo wrote, "One can resist the invasion of armies; one cannot resist the invasion of ideas." On April 15, 1943, **The Nation** sent out a subscription circular with the sentence: "There is nothing stronger in all the world than an idea whose time has come." This statement by **The Nation** was a misquotation of the quote by Hugo as stated above. Since 1943, however, the quote has generally been translated as **The Nation** translated it.

2. Young, D. **The Legal Aspects of Student Dissent and Discipline in Higher Education.** (Athens, Georgia: Institute of Higher Education, 1970), p. 19.

3. **Tinker** v. **Des Moines Independent Community School District,** 393 U. S. 503 (1969).

4. **Veed** v. **Schwartzkopf,** 353 F.Supp. 149 (1973); **Lace** v. **University of Vermont,** 303 A. 2d 475 (1973); **Rainey** v. **Malone,** 141 S. W. 2d 715 (1940); **Randall** v. **Colorado State Board of Agriculture,** Dist. Ct., Court of Larimer, Civ. Action No. 19032 (1969); **Stringer** v. **Gould,** 314 N.Y.S. (2d) 309 (1970); **Fellner** v. **McMurray,** 323 N.Y.S. (2d) 337 (1971); **Conn** v. **Regents of the University of California,** No. 375307 Super. Ct. Alameda County (1968): **Huddleston** v. **Ketter,** Sup. Ct. Erie County, N. Y. (1971); **Moye** v. **Board of Trustees of University of South Carolina,** 177 S.E. (2d) 137 (1970); **Farrell** v. **State Board of Regents,** 179 N.W. (2d) 533 (1970); **Iowa Hotel Association** v. **State Board of Regents,** 114 N.W. (2d) 539 (1962); **Grier** v. **Bowken,** 327 F. Supp. 892 (1971).

5. Attorney General Opinion, Oregon, 1969; Attorney General Opinion, Wisconsin, 1949; Attorney General Opinion, Ohio, 1971.

6. **Paulson** v. **Minidoka County School District,** 463 P. 2d 935 (1970) and **Granger** v. **Cascade Co. School District,** 499 P. 2d 780 (1972) are examples.

7. 303 A. 2d 475 (1973).

8. 353 F. Supp. 149 (1973).

9. 478 F. 2d 1407 (1973).

10. 94 S. Ct. 878 (1974).

11. Although there may be exceptions, it is the general rule that minors retain the same domicile as their parents, unless they are legally adopted by an adult in which case their domicile would then be that of the adopted parents.

12. 93 S. Ct. 2230 (1973).

13. **Ibid.**

14. **Weaver** v. **Kelton,** 357 F. Supp. 1106 (1973).

15. **Hasse** v. **Board of Regents of University of Hawaii,** 363 F. Supp. 677 (1973).

16. 94 S. Ct. 569 (1973).

17. **Sturgis** v. **State of Washington,** 368 F. Supp. 38 (1973).

18. 401 U. S. 495 (1971).

19. **Hancock** v. **Regents of University of Wisconsin,** 213 N.W. 2d 45 (1973).

20. **Hayes** v. **Board of Regents of Kentucky State University,** 362 F. Supp. 1172 (1973).

21. **San Antonio Independent School District** v. **Rodriquez,** 36 L. Ed. 16 (1973).

COLLECTIVE BARGAINING IN HIGHER EDUCATION

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Collective bargaining is a decision-making process. If bargaining comes to an institution of higher education, the previously existing decision-making processes are altered. Collective bargaining can touch nearly every employee within the institution, including employees in the following occupational classifications: maintenance, food-service, clerical, technical, administrative (except supervisory and managerial employees who would be excluded under the National Labor Relations Act), professional, and faculty. Those employees who choose to form "bargaining units" will be directly affected. Those employees who do not form bargaining units will keep a watchful eye on those employees who have formed bargaining units to make certain of equal or better treatment.

The purpose of this paper is to discuss issues and concerns which arise when the collective bargaining process comes to campus. Others have and are making the public policy decision that employees in both private and public higher education should have the opportunity to bargain collectively with their employers. This paper is not concerned with the wisdom of those decisions. Rather, it focuses on the questions which higher education administration must address once the collective bargaining policy decision is made. Because this conference is composed mainly of academic administrators in four-year institutions of higher education, the paper concentrates on faculty bargaining in four-year institutions. Many of the matters discussed do apply to other employee groups. Those interested in more comprehensive treatment of collective bargaining in higher education are referred to the article by J. David Kerr and Neil S. Bucklew on collective bargaining to be published in September of 1974 by the National Association of College and University Business Officers in their service entitled "Federal Regulations and the Employment Practices of Colleges and Universities."

Labor relations and labor law are specialized fields. The reader is cautioned that these materials are not a substitute for the use of qualified professional persons. It is hoped that the reader will be alerted to problems brought by collective bargaining. Each institution because of its unique nature will have to fashion its own solution to problems using proper professional guidance.

Distinction Between Private and Public Employment

Private institutions and public institutions receive different treatment under existing labor law. Private institutions are covered by the National Labor Relations Act. Jurisdiction of the National Labor Relations Board over faculty matters is currently being contested by Wentworth College of Technology and Wentworth Institute in Boston. The National Labor Relations Act does not apply to public institutions. Public institutions are covered by their own state legislation. Thus, it is possible for fifty different approaches to exist in the fifty different states toward collective bargaining in higher education. Currently, some states have no legislation covering public higher education. In some states which have no legislation along these lines, institutions do have unions——as in Ohio and Illinois. Others, such as Michigan, have

had legislation for a long period of time, and others, such as Florida and Iowa, have recently passed legislation covering institutions of higher education. In addition, legislation is pending before federal lawmakers which would bring collective bargaining to public higher education in those states not having legislation covering the matter.

Before the Union Comes

When collective bargaining does come, it often results in greater administrative attention and expense for those employees who form a bargaining unit. For example, it is reported that $120 to $125 more per faculty member for administration is now spent at City University of New York as a result of collective bargaining. The figure would be higher on the basis of full-time positions, since a large portion of the CUNY unit consists of part-time faculty. It may make sense to begin some of this administrative effort before any potential bargaining unit begins to form. Perhaps if more attention is given to the personnel areas, unionization will not result. If it does result, perhaps the advance effort will result in a better relationship than otherwise might have been between the union and the educational institution.

Among other matters, a good personnel program would include the following: a competitive salary; salary systems which are understood and based on sound personnel philosophy; a fringe benefit program which makes sense and is communicated to employees; surveys conducted on local, regional, and national bases for comparable data in connection with employees; appeal and grievance procedures; attention to working conditions; a rational system for promotions and transfers; a method for receiving employee input; good supervision and training for supervisors; written and unwritten rules; and a regular method of communication for employees.

Labor relations and personnel people differ in their opinions as to whether attention to personnel programs before unionization actually affects unionization. Wisdom will, however, dictate thoughtful contemplation with respect to the institution's existing personnel programs for all employees including faculty, considering whether the program now existing should be improved before the union comes.

Union Organizing Drive

Theoretically the employees in an employee group appropriate for bargaining (a "bargaining unit") decide whether they wish to be represented by a collective bargaining **agent.** Theoretically, the institutional employer does not decide. Theory may most nearly approach reality when employees vote as to whether they wish to be represented by a collective bargaining agent. The theory may not be quite so well realized in situations where the employer "recognizes" the union without an election. Recognition without an election is allowed under the National Labor Relations Act. Recognition without an election may or may not be allowed under different state legislation and state agency rules.

Union organizing drives begin for a variety of reasons. The reasons are usually related to the feeling on the part of one or more employees that they will be better off if represented by a union. The most common technique for organizing is to assign an organizer to the institution. Naturally if the organizing movement is purely local, the professional organizer may not be used. Those persons attempting to organize a particular bargaining unit on the campus will speak in terms of issues which are appealing to the employees. Usually there is an indication that the union will afford protection against certain administrators or against some atrocity which has occurred either on the campus or elsewhere.

The educational institution should give serious consideration as to how it will react to the organizing drive. There may be a tendency to do nothing because of concern over alienating certain employees in the potential bargaining unit. The growing experience appears to indicate that an information campaign by the institution may be a good approach during a union organizing drive. Surveys made by the Bureau of National Affairs of white collar elections indicate that employees in

proposed bargaining units vote no union more often when the employer enters into the election campaign. The results of the Michigan State University elections and New York University elections add support for this proposition. The Michigan State and New York University approaches both involved informing faculty members as to the institutional position and the ramifications of collective bargaining. Members of the faculty may be interested in information such as the following:

1. A majority of those persons voting will determine the question of unionization.

2. The union is an agent and it will determine through its own governing procedures what it will demand on behalf of the faculty and what it will agree to on behalf of the faculty.

3. Unionization will not increase the resources available to the university for jobs or for compensation.

4. Collective bargaining is adversarial in nature and is thought by some to be antithetical to the deliberative processes of an institution of higher education.

5. Unionization can lead to rigid formalities hampering the individuality of separate faculties and restricting the freedom of faculty members.

6. What type of membership will be allowed under the union constitution? For example, does it include K–12 teachers?

7. All of the faculty will not necessarily vote on ratification of contracts. In some unions, only the executive board votes on contract ratification. In other unions, only members of the union (which may be fewer than those represented) vote as to how ratification of a contract will take place.

8. The bargaining unit in which faculty are to be included contains other professional people who are not teaching faculty who will have interests different from those of the teaching faculty.

The question as to whether an unfair labor practice is being committed by institutional communication to the faculty during an organizational campaign must be considered. The National Labor Relations Act in Section 8(c) provides for a right of free speech by employers. Even if the act did not provide such a right, no statute may remove the First Amendment free speech rights of any citizen. One cannot commit an unfair labor practice with speech alone. The speech must contain a "threat of reprisal or force or promise of benefit" in order to constitute an unfair labor practice. The items listed above would not generally be considered a threat of reprisal or force or a promise of benefit. If the institution of higher education does determine that it will enter into a debate during the organizational campaign, it should have professional assistance in designing its communications.

Additional issues will arise during the organizational campaign. For example, what can employees and non-employees do on the institution's property? What rules govern parking lots and other public places? In addition, there may be concerns in the area of economic strikes to force recognition, informational picketing, problems caused by third parties such as townspeople who get involved on either the union or institutional side, racial prejudice issues, wearing of buttons and badges on the employer's premises, and others.

Recognition and Elections

A union becomes an **exclusive collective bargaining agent** either through recognition by the employer or certification by either the National Labor Relations Board or state agency following a representation election which may be a "consent election" or "directed election." Theoretically, recognition of a union should take place by an employer when a majority of a group of employees appropriate for the purpose of collective bargaining (a bargaining unit) make known through petition or signing of cards that they wish to be represented by a particular union as an exclusive bargaining agent. Under the National Labor Relations Act, employers have been found guilty of unfair labor practices if they

have refused to bargain collectively after viewing an appropriate "showing of interest" of 50 percent or more of the employees in an appropriate "bargaining unit." States may vary in their practice with respect to this matter. If the institution of higher education does not wish voluntarily to recognize the union without an election, **it should refrain from looking at cards or petitions which may be presented by the union.** Looking at the cards or petitions may remove any bona fide doubt which the employer has as to the union's having a majority of employees in an appropriate unit. Professional assistance is needed with this technical matter and should be sought at the first sign that cards or a petition are being circulated on the campus.

Under the NLRA an election may be sought by a union through the presentation of cards or a petition from 30 percent of those in a bargaining unit. An employer may petition for an election after a request for recognition from a union under the National Labor Relations Act. Under state statutes employer's rights to request an election vary. Under the National Labor Relations Act, another union with a 10 percent showing of interest may intervene and appear on the ballot with equal rights to those of the union presenting a 30 percent showing. State statutes differ on the amount of interest which must be shown varying from 15 percent to 35 percent on the original petition and with different percentages for interveners.

Determining Institutional Positions in Labor Board Proceedings

The National Labor Relations Board and state agencies with jurisdiction over labor relations conduct hearings for the purpose of determining issues arising under labor legislation. Among the hearings conducted are hearings on the composition of the bargaining unit and hearings on whether a party has violated one or more duties under the applicable legislation.

A bargaining unit is a group of employees considered appropriate as a group for collective bargaining under applicable legislation. Several considerations must be made when determining whether an institution will oppose a proposed collective bargaining unit. The first consideration must be whether the groupings of employees as proposed for the bargaining unit will be tolerable if collective bargaining is chosen by the employees. Other considerations include:

1. The reaction of the employees to the institution's opposition of the unit.

2. The effect of delay in reaching an election. For example, after the NLRB established a unit in the well-known **Fordham University** case, 193 NLRB 23 (1971), the faculty at Fordham voted "no union."

3. The possibility that the unit eventually determined by the Labor Board will be so large that the union cannot make its 30 percent showing of interest. Thus, there would be no election and no exclusive bargaining agent.

4. The likely result of the vote depending on the unit chosen (winning the election).

5. Others.

Unfair labor practice charges may be brought by any person. Usually either the union or the employer brings the charges for alleged violations of the NLRA and of many state acts. Charges are brought either during an organizing period or following organizing during contract negotiation or contract administration. Such procedures do affect the outlook and morale of the institution's employees. Such proceedings may also affect the scope of subjects included in negotiations. Professional personnel and legal help should be sought when considering these questions.

Conduct of Representation Elections

Representation elections are held for the purpose of:

1. Choosing whether employees in a bargaining unit wish a collective bargaining agent and, if so, what agent.

2. Selecting a different bargaining agent.

3. Decertifying a collective bargaining agent with the result that employees will not have a union.

Under the NLRB the choice of union and agent occur in the same election. In public employment some states have developed a two-stage election system. In the first stage employees vote on whether they wish to have a union. If they vote for a union, an election is then held to determine which union will represent them. Another possible system would allow employees to vote on whether they wish a union and which union they would prefer at the same time. If a majority chose not to have a union, there would be no union. But if a majority chose a union, the system would allow those who voted "no union" some voice in which union would represent them.

Elections result either from consent of the parties or direction of the appropriate labor board. The details for the election will generally be in either the consent agreement or in the direction for the election. The employer is usually required to post notices of the election and may provide the place for the election.

During the period prior to election, as noted above, the employer and union have the right to free speech over the issues in the election. However, a special twenty-four-hour rule applies in the private sector and also in many portions of the public sector. In the twenty-four hours prior to the election, captive audience speeches to employees are prohibited on or off institutional premises even if the union is given equal time. The rule applies to talks during coffee breaks even though employees may voluntarily leave and applies where a voluntary speech is given. If the twenty-four-hour rule is broken and if the employees vote "no union," the election may be set aside.

The atmosphere surrounding the place for the election should be free from coercion of the employees who are voting. Under NLRB rules and under many public boards, no person holding a high position in the institution may be present at the place of the election during polling hours.

Both the union and the institution are often allowed observers at the election. These observers check the names of the people voting to make certain that they are within the bargaining unit. Observers may challenge persons appearing at the polling place who are not in the bargaining unit. When a challenge is made, the ballot is placed in a separate envelope so that the issues in connection with the challenge may be determined. If after appropriate procedures are concluded, the challenged ballot is allowed, it is taken from the sealed envelope and placed with the other ballots. If the challenged ballot is disallowed, it will probably be destroyed and will not be counted.

Following an election, the election's officer often presents a document to be signed stating that the election was properly conducted. The institution might be wise to consult with counsel before signing any such document following the election.

Unfair Labor Practice Procedures

Unfair labor practice proceedings are the method for enforcement for most of the duties under national and state collective bargaining legislation. Statutes of limitations are provided in national legislation and in many state statutes. An unfair labor practice charge must be filed not later than the time limit allowed after the alleged unfair labor practice has occurred. A late charge upon motion of the responding party results in dismissal of the charge. The NLRA statute of limitations is six months. Some state statutes have shorter periods of limitation.

Under the National Labor Relations Act anyone may file an unfair labor practice "charge." The regional directors of the NLRB investigate the charges in their capacity as a branch of the Office of the NLRB General Counsel. If the regional director upon investigation finds that the charges may be supported by evidence, the regional director will issue a "complaint." Responding parties are given notice of the complaint, and a hearing is set. A time is allowed for answering the complaint. Naturally, counsel should be consulted in these technical matters.

In public employment, unfair labor practice procedures vary. In the state of Michigan a charge leads directly to hearing. There is no intermediate investigation to determine whether there is any foundation for the charge. On the other hand, in Michigan no general counsel is provided free of charge to the charging party to prosecute the case. Charging party in Michigan must either hire an attorney to present the case or present it without an attorney.

Unfair labor practice hearings are very similar to trials before judges without juries. The literature refers to unfair labor practice hearings on occasion as more informal than court trials. However, witnesses are called, testimony is taken and parties have an opportunity for cross-examination and argument. The hearing produces a record consisting of a transcript and exhibits. The record becomes the basis of NLRB and state board reviews. There usually is no chance later to change or amend the record (Florida is an exception). It is, therefore, crucial that an institution make the best record possible at the hearing. Such a record will be costly, but necessary.

A common procedure under the NLRA as well as state proceedings is for the administrative law judge or hearing officer to prepare a decision which may be called an intermediate report. Exceptions to the decision may be taken by either party within a period of time from the filing of the decision. If no exception is taken, the decision may automatically become the decision of the NLRB or state labor board.

The NLRB and most state labor boards do not have their own enforcement powers. They must turn to the courts for enforcement. In addition, parties who feel aggrieved of NLRB and state labor board orders have recourse to appeal the board decisions to the courts.

Preparation for Negotiations

The author believes that thorough preparation is one of the most important elements in collective bargaining. Unfortunately, the importance of preparation may be fully understood only by those who have failed to prepare and later come to understand the need to prepare. Proper and thorough preparation is especially important for the first collective bargaining agreement. That agreement can set the tone for labor relations at the institution for many years in the future. Since the service rendered by the institution is mainly accomplished through personal services of employees, the importance of the future relationship and preparation for that relationship cannot be overstated.

Preparation should begin directly following a representation election. It is not necessary that a spokesman for the future institutional negotiating team be determined. It is important that the data regarding issues and the makeup of the bargaining unit be assembled.

A plan for preparation should include:

1. Designation of a person to be primarily responsible for guiding the preparation process.

2. Designation of person or persons responsible for selecting the institution's negotiator for the contract.

3. Determination of the manner in which the institution will consider its long-range and short-range goals considering the advent of collective bargaining at the institution. In this regard, consideration should be given to a small executive committee consisting of the president and executives responsible for the division of the university in which members of the bargaining unit are employed.

Activities may proceed simultaneously. Deliberations may take place at the same time as to who will be the spokesman, who will be on the negotiating team, determination of the institution's long-range and short-range policies, and collection of data.

The decision-making process involved in collective bargaining may be viewed as a continuum which leads in some direction. The institution may

influence that direction. It should determine now how it wishes to make decisions on different topics within the institution ten and fifteen years in the future. Does it wish to make those decisions by collective bargaining? Does it wish those decisions to be made by the academic governing processes of the institution? Naturally, the long-range policy issues regarding the maintenance and food-service bargaining unit may differ from those of a faculty bargaining unit.

Once an institution has determined its policy goals, it must then determine what its bargaining posture and position will be in connection with achieving those goals. The assistance of professional personnel people and legal counsel will be required. In connection with preparation, the following detail should be compiled:

1. Legal organization of the institution and documents in connection with its legal organization.

2. Compilation of pertinent state and federal legislation affecting the institution and its employees. Examples are minimum wage laws, civil service laws, occupational safety and standard statutes, statutes regarding civil rights and discrimination, etc.

3. Compilation of documents relating to the traditions and customs of the bargaining unit. In the academic area, the institution will wish to compile the various statements of the AAUP, the tenure commission report, reports of the Carnegie Commission, etc.

4. The written and unwritten policies of the institution, reviewed in connection with their effect on bargaining unit members.

5. The facts with respect to perceived and actual grievances of persons in the bargaining unit, summarized and verified. These matters often arise at the bargaining table, and preparation in advance of bargaining will aid negotiators in furnishing actual facts when the issues are raised.

6. A review of experiences of other institutions and of industrial concerns within the geographic region. The experiences and patterns within the region will likely have an effect on negotiations at the institution. Further, the arbitration experience of similar institutions should be reviewed. This experience may be found in the American Arbitration Association publication entitled "Arbitration in the Schools," which can be ordered for a charge from the AAA at 140 West 51st Street, New York, New York 10020. In addition, publishing houses such as the Bureau of National Affairs and Commerce Clearing House publish a wide variety of arbitration decisions.

Collective bargaining is a two-way street. The institution may have goals it wishes to achieve through collective bargaining which it has been unable to achieve in other ways. If so, a system should be devised for determining those goals and then determining the strategy and tactic to be used for achieving the institution's goals.

While considering institutional policy, consideration must be given to the realtionship between governing boards, presidents, the negotiators. And if a public institution, the relationship with the governors, with legislators, with memebers of the public, et cetera must all be considered. In addition, thought shall have to be given to the place of students in negotiations.

Eventually the bargaining team will have to be chosen. The first bargaining team should definitely have an attorney as one of its members. The attorney need not be a spokesman and should be familiar with the labor law area. For faculty bargaining units, there should be representation from academic units. The assistance of the institution's personnel director may be advisable, and there should be a person skilled at costing and a person who is familiar with the demographic figures pertaining to the bargaining unit.

The organization for bargaining may occur in many ways. One pattern is to have a large group of

persons who react to position papers prepared within the institution. The negotiating team is often part of this large group. While the group may make no final decisions, all of the thoughts and ideas of this group will be of use to the negotiating team at the table. A compilation of statistical data in connection with bargaining is a necessity. Compilation of data for bargaining is a common function of personnel people, and they will be of assistance in this task.

The author believes that, especially for the first negotiations, the spokesman for the institution's negotiating team should interview personally at least each dean within larger institutions and each department head or chairman or person within smaller institutions. We should remember President Woodrow Wilson's comments with respect to the politics of institutions of higher education and realize that there are competing interests within the institution. The negotiator for the institution should be sensitive to these competing interests.

Preparation for public relations should be made. If collective bargaining is new within the institution, time should be spent with the press discussing the proper role of the press in negotiations. The press should be alerted against being used by the union or institution in connection with news releases, etc. One arrangement which might be established would be to have the newspaper always call the other side in the event that one side does make a release. This at least gives the other party an opportunity for comment should comment be desired.

Other issues which must be considered in connection with preparation are:

1. Selection of the institution's spokesman.
2. Drafting the institution's initial proposal.
3. Preparation of an area proper for bargaining.
4. Preparation for the first bargaining session.

Bargaining the Agreement

Either the union or the institution may request the opening of negotiations. The institution is under no legal obligation to make such a request and may wait for the union's request to bargain. Once the initial request is made, both union and institution are under a duty to proceed with reasonable dispatch to bargaining. Both parties are under a duty to bargain in good faith. The federal legislation is of assistance in determining what that duty is. The statute provides in part:

> . . . to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and to confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . .

The "duty to bargain in good faith" under the statute is probably not capable of precise definition. Decisions of the courts, the NLRB, and state labor boards are based on specific fact situations; and for that reason precise guidance in any particular situation is not always possible. The following generalizations may be made with respect to the duty:

1. The duty applies to the union and the employer under the NLRA but may apply only to the public employer under public Wagner Act type of legislation.
2. The "totality of conduct" is viewed in bargaining to determine whether an employer or union has bargained in good faith.

3. The duty concerns a bilateral process whereby both the union and the employer establish wages, hours, and other terms and conditions of the employees. Thus, a unilateral determination by the employer to change a condition without first bargaining or taking an unalterable position at the commencement of negotiations may violate the duty.

4. The National Labor Relations Board and many state boards will look for an attempt to reconcile differences. While the national act explicitly states that no concession is required and many state statutes contain the same provision, the courts appear to look for some type of compromise. The First Circuit Court of Appeals said in the case of **Reed and Prints Manufacturing Co.**, 205 F 2d 131 (CA1, 1953):

> While the board cannot force an employer to make a "concession" on any specific issue to adopt any particular position, the employer is obligated to make some reasonable effort in some direction to compromise his differences with the union, if section 8(a)(5) is to be read as imposing any substantial obligation at all.

5. The advancement and exchange of proposals is an indication of "good faith."

6. Undue delay in meeting and furnishing properly requested information may be viewed as an indication of failure to bargain in good faith.

7. Dealing with the union on matters of wages, hours, and other terms and conditions of employment rather than bypassing the union is an element in determining "good faith bargaining."

An employer can be guilty of an unfair labor practice only if it refuses to bargain in good faith on a mandatory subject of bargaining. Mandatory subjects include discharge of employees, seniority policy, working schedules, vacations, individual merit increases, pensions, insurance, Christmas bonuses, subcontracting, adoption of technological improvements, prices charged in cafeterias serving employees (but not if the prices are charged by an independent contractor operating within the cafeteria), wages, overtime, shift differential, severance pay, paid holidays, a management rights clause, incentive pay plan, stock bonuses, coffee breaks, termination of employment (but the employer during negotiations may insist that the employer reserve the right to determine "just cause" as a management prerogative), manner in which employees would be laid off, safety rules, production work by supervisors where it is contended such work deprives employees of overtime pay, working schedules, grievances, grievance procedure, union security, group health and insurance plans, hours of employment, sick leave, use of bulletin boards, tuition remission, etc. The scope of bargaining at institutions of higher education is presently being litigated in public employment in many states including New Jersey, Nebraska, and Michigan. At issue are the following topics: the right to hire, maintain control and efficiency, schedule work, control transfers and assignments, determine what extracurricular activities may be supported or sponsored, determine the curriculum, class size, types of specialists to be employed, school calendar, etc. State statutes may explicitly limit the scope of bargainable issues. Hawaii is an example.

In connection with training for bargaining at the table, actual experience is the best trainer. The author suggests that, especially for the first bargaining session, the institution take advantage of contacts and seminars where this experience might be gained. College related organizations where such opportunities may be available are Academy for Academic Personnel Administration, College and University Personnel Association, National Association of College and University Attorneys, and National Association of College and University Business Officers. The first bargaining session is usually devoted to joint organizing for bargaining by the union and the institution. The ground rules are explored at this session.

At some time one party or the other will begin to advance demands. It is wise for the parties to agree that there will be some point at which each will not raise any new subject areas for demand. This will prevent getting down to the last part of negotiations and having one of the parties raise several new issues just when everybody thinks a contract is settled.

After receipt of the union's demands several tasks must be accomplished. The cost of the proposed contract must be determined. An analysis of the written language must be made, and legal issues must be highlighted. An attempt must be made to assess which items are most important to the union. At some point the institution will have to begin to prepare its language and proposals. Hopefully its initial proposal will be completed prior to the commencement of negotiations, although it may be modified in light of the union's demands. Some union demands may have a direct or indirect impact on fundamental institutional policy. A means for executive guidance for the negotiating team must be arranged.

There are no established rules for success at the bargaining table. The parties do have different goals on some issues. Recognition of the reality of different goals and the difference in degree of importance of goals is helpful in connection with bargaining table success. Additionally, the problems with which the two parties deal differ. The union's concerns are primarily political. It must please the majority of those people it represents or at least a majority of those who will vote on the final contract. It is concerned with the employment related matters of employees. The institution is concerned about service to students, public service, research, use of its limited resources in program, and relationships with third parties such as boards of trustees, the governor, state legislatures, students, alumni, and the general public. Naturally employees are interested in many of these matters. But which would a majority sacrifice first---a secure job or an institutional goal? Recognition of the different goals and audiences to which the two parties respond is important in connection with attempting to find accommodation at the table.

Eventually agreement will likely result from the negotiations. Ratification follows. Generally the union ratifies the contract first by whatever method it has determined it will use. The governing board of the institution then usually follows with ratification.

If an agreement does not result, a deadlock or "impasse" may result. During "impasse" the duty to bargain in good faith is suspended. The institution may unilaterally implement its last offer and may have other choices for unilateral action. There is no specific formula for determining when an impasse exists. Assistance of labor counsel is recommended for dealing with impasse problems.

Several impasse resolution procedures exist. Some are available under the National Labor Relations Act, and some are available under state acts. The specific legislation must be consulted in order to determine what is available to each institution. Impasse resolution processes are as follows:

1. Admonition
2. Intervention of the courts
3. Mediation
4. Fact-finding
5. Arbitration
6. Lockout
7. Strike

Admonition takes place when a third party with some status such as the President of the United States or a governor admonishes the parties regarding their situation. The parties may be called to a high level official's office for consultation.

The courts sometimes intervene in labor disputes. This usually occurs when the parties are before the court asking for some type of equitable relief such as an injunction to stop violence. Once the court has gained jurisdiction it may require the parties to

negotiate in the court's chambers or elsewhere in the courthouse. The court may not have jurisdiction or power for this action, but the parties may cooperate since the court does have the power to give the other relief requested or the court's action may give the employer and union a face-saving means to resume talks which have broken off.

Mediation and conciliation are often used interchangeably, but they do have different meanings. Conciliation is an attempt to convince the parties to resume negotiations. Mediation includes conciliation and also includes making suggestions, listening to the parties, and attempting to facilitate agreement.

Fact-finding does not exist under the National Labor Relations Act but is available under many state procedures. (As an aside it should be noted that state impasse resolution procedures are often available to both private and public employers. The fact that the National Labor Relations Board may have jurisdiction over a private employer will not necessarily preclude state assistance with mediation and fact-finding.) A fact-finding board or person ordinarily conducts an evidentiary hearing either private or public. After the conclusion of the hearing, a report is issued summarizing the pertinent economic information, the position of the parties, and making recommendations for resolution of the dispute. The fact-finding report is made public. The report is not binding upon the parties, but its public nature does have weight in the negotiations.

Arbitration may be voluntary or compulsory. It may be advisory or binding. No federal statutes require binding arbitration. States such as Iowa have statutes which require compulsory binding arbitration for the resolution of impasse. The arbitration is not for the purpose of interpreting an agreement as is found in a normal grievance procedure once a contract has been reached. Rather, the arbitration is "interest arbitration" which sets the terms of the contract. A discussion of "interest arbitration" for contract dispute resolution is contained in Howlett's **Contract Negotiation Arbitration in the Public Sector,** 42 Cincinnati Law Review, number 1 (1973).

Under the National Labor Relations Act the United States Supreme Court has held that an employer may shut down its plant and lay off its employees to bring economic pressure to bear on the employees in support of the employer's legitimate bargaining position. This action is called a lockout. In the public sector, lockout has not always been approved, and resort must be had to local labor counsel to determine the propriety of lockout under local statute.

Strike is the union's ultimate economic weapon and is proper under the National Labor Relations Act provided the statutory prerequisites to a strike have been attended to by the union. Strike is prohibited under some state statutes, although some state courts such as the Michigan courts have made any equitable remedy (such as injunction) very difficult to obtain during an illegal strike. Thus there may be a prohibition against strike but very little actual remedy for strike.

Contract Administration

The duty to bargain collectively continues during the existence of a collective bargaining agreement. Under the federal legislation and most state legislation the institution has a duty to meet and bargain concerning the resolution of grievances. In addition there may be a duty to bargain during the term of the contract concerning mandatory subjects which were neither discussed nor embodied in the agreement. The parties may provide for meeting their duty to bargain through the collective bargaining agreement. If this is done, specific lanaguage with respect to how the duty will be met should be made in the agreement. Even if provision is made in the agreement for carrying out the collective bargaining duty, there may still be an additional duty to bargain should the institution shut down or subcontract bargaining unit work which affects the jobs of employees.

Administration of the collective bargaining agreement is generally a delegated function. In the faculty area, an office will have to be established for contract administration. This office will deal with union relationships and union grievances, assist administration with interpretation of the contract, and so forth.

One importa: t labor relation principle applies in contract adm.nistration. **The employer acts and the union reacts.** After a union becomes part of the decision-making process at an institution of higher education, one often hears administrators and supervisors stating they cannot do something because somebody from the union said they could not. Such an attitude is a mistake and should be eliminated from the thought patterns of those administrators and supervisors. The employer interprets the agreement, and the union alleges misinterpretation. If the union feels the agreement has been violated, it may bring a grievance. The institution must have sufficient labor relations and legal assistance to have the strength of informed conviction in taking its actions. It must train its supervisors and administrators, and it must be prepared to take matters through grievance and binding arbitration if binding arbitration is the end of the grievance procedure. Techniques involved in connection with contract administration and union relationship are many and varied. The following are some normal types of techniques used:

1. Informal dialogue
2. Regular meetings with the union
3. Contractual committees
4. Special conferences
5. Negotiations
6. Contract grievances and grievance administration

In faculty bargaining units there may be a clash between the peer review systems which have been traditional and contractual grievance systems ending in arbitration. The institution must determine what system it feels best assists the institution in meeting its educational mission and must then attempt to obtain that system through bargaining.

Relationship Between the Union and the Institution

Finally, the relationship between the institution and the union must be stressed. In the final analysis the union must either be accepted or rejected. If the union is accepted, it does make sense to build a relationship which will be constructive and lend to problem solving. If an administration attempts to reject a union when clearly the employees in the bargaining unit have accepted it, its attitude can only lead to constant friction. If the union is rejected by the administration, it is apt to feel constantly threatened. It will act consistent with that human feeling to remove the reasons for feeling threatened. Through all of this, I recommend that the institution constantly hold out the welcome mat for a good relationship. No matter how bad any institutional or union relationship might be, if the union stays, the parties must eventually achieve some constructive modus operandi in their relationship. The institution should not be guilty of any barriers toward establishment of such a relationship.

PROBLEMS OR OPPORTUNITIES FOR THE COLLEGE OR UNIVERSITY IN ACHIEVING ITS AFFIRMATIVE ACTION OBLIGATIONS AS AN EMPLOYER OF ACADEMIC AND OTHER PROFESSIONALS

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Since the landmark decision of the United States Supreme Court in **Griggs** v. **Duke Power Company**,[1] the federal courts have fashioned detailed guidelines for use by employers, including private and public institutions of higher education[2] in determining those employment practices which are proscribed under the federal Constitution and statutes. The wealth of federal law defining unlawful employment discrimination does not, however, speak directly to the responsibilities of the college or university as employer to implement programs of affirmative action in employment. On this subject, the federal courts have yet to define in detail the obligations of employers, including private and public institutions of higher education.[3] However, some determinations do exist which, in my opinion, an institution should consider in the planning, writing, and implementing of an affirmative action program in employment.

Any institution must understand that neither the minimum requirements of affirmative action nor, more importantly, the permissible scope of affirmative action has been well defined. The institution is therefore at some risk in implementing any affirmative action program, since neither the courts nor indeed those agencies responsible for the enforcement of affirmative action programs have clearly fashioned the identity of acceptable programs. Furthermore, the institution should understand that in implementing a program of affirmative action in employment it may invite litigation charging employment discrimination. Such risk cannot and should not, in my opinion, persuade the institution against the implementation of a program of affirmative action in employment.

The difference in the responsibilities of the employer to eliminate unlawful employment practices and to take affirmative action is mainly one of degree. The constitutional and statutory mandates against employment discrimination affect the employer by requiring the abatement of employment practices which have a disparate impact upon individuals and classes of persons and which do not relate to successful performance of the jobs for which they are required. The objective of federal legislation against employment discrimination was expressed by the United States Supreme Court in **Griggs** v. **Duke Power Company, supra**:

> The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees.[4]

Affirmative action on the other hand is a responsibility of covered employers created by Executive Order of the President 11246, as amended by Executive Order 11375, and implemented through regulations of the Department of Labor, 41 Code of Federal

Regulations, Chapter 60.[5] As defined in the Higher Education Guidelines promulgated under Executive Order 11246 by the United States Department of Health, Education, and Welfare,[6] affirmative action requires a covered employer—i.e., a non-construction contracting agency of the government or contractor or subcontractor who performs under government contracts, as defined in Title 41 of the Federal Regulations—to do more than insure employment neutrality with regard to race, color, sex, religion, age, and national origin. Affirmative action requires the employer to make additional efforts to recruit, employ, and promote qualified members of groups formerly excluded from employment, even if that exclusion cannot be traced to particular discriminatory actions on the part of the employer. The premise of the affirmative action concept of the executive order is that unless positive action is undertaken to overcome the effects of systematic institutional forms of exclusion and discrimination, a benign neutrality in employment practices will tend to perpetuate the **status quo ante** indefinitely.[7]

The critical element in the establishment and implementation of an affirmative action program and the requirement not yet clearly defined either by the Higher Education Guidelines or the federal case law is the requirement of establishing goals and time tables for the recruitment, hiring, and utilization of members of groups formerly excluded from employment.

The affirmative action guidelines provide that as a part of the affirmative action obligation of an employer, revised Order Number 4 requires the employer to determine whether women and minorities are "underutilized, in its employee work force and, if that is the case, to develop as a part of its affirmative action program specific goals and time tables designed to overcome that utilization." Clearly this requirement extends beyond the elimination of qualifications for employment, promotion, and the like which have a disparate impact upon certain individuals or groups and which are not bona fide occupational qualifications. In short, affirmative action requirements extend beyond the providing of equal employment opportunity. Goals are defined in the Higher Education Guidelines as:

> . . . projected levels of achievement resulting from an analysis by the contractor of its deficiencies and what it can reasonably do to remedy them, given the availability of qualified minorities and women and the expected turnover in its workforce. Establishing goals should be coupled with the adoption of genuine and effective techniques and procedures to locate qualified members of groups which have previously been denied opportunities for employment or advancement and to eliminate obstacles within the structure and operation of the institution which have prevented members of certain groups from securing employment or advancement.

In this regard, the Higher Education Guidelines provide that in both academic and non-academic areas universities must recruit women and minority persons as actively as they have recruited white males and must modify or supplement recruiting policies by vigorous and systematic efforts to locate and encourage the candidacy of "qualified" women and minorities.

It is this requirement that is the most ambiguous of all affirmative action requirements placed upon the institution or indeed upon any employer implementing a program of affirmative action. The difficulty in implementing this affirmative action requirement of the college or university is in the employment of academic and other professionals. Here the difficulty is not in the establishing of a systematic effort to reach women and minorities but in the determination of those criteria which must be established to identify "qualified" applicants (or candidates for promotion, tenure, and the like). Here is the problem or the opportunity for the college or university, depending upon its view of affirmative action in employment. For the institution viewing any abatement of traditional requirements for employment in the academic sector of the college or university as a compromise of the integrity and excellence of higher education, affirmative action mandates may present a problem. The institution may not continue, in my opinion, to hire, promote, or tenure only the "most qualified" or "best qualified" applicant for employment or candidate for promotion or tenure. Neither, in my opinion, are such requirements as the terminal

degree necessarily sacred where it cannot be demonstrated that such requirements are demonstratively related to successful performance of the responsibilities of the position for which the candidate is being considered. On the other hand, for the institution committed to affirmative action to correct the historical underutilization of minorities and women in its academic and professional work force and to introduce into that work force persons representative of a wide variety of backgrounds and skills, each possessing potential for increasing the quality of the institution and furthering its educational mission, an analysis of the federal case law in the area of employment discrimination indicates that the courts vest in the college or university wide discretion in defining the criteria for identifying qualified applicants for employment or candidates for promotion or tenure. Repeatedly, in employment discrimination litigation, the federal courts have held that the exercise of judgment in the selection or evaluation of a professional, although involving an element of subjectivity, is not invalid in the absence of a demonstration that such judgment is employed with a sex, racial, or ethnic bias.

In **Duffield** v. **Memorial Hospital Association of Charleston**[8] the District Court for the Southern District of West Virginia entertained a complaint under the 1964 Civil Rights Act, 42 U.S.C. Sec. 1983, and under the Fourteenth Amendment that a hospital arbitrarily refused to renew the staff privileges of the plaintiff, a physician licensed to practice in the state of West Virginia. Holding that the decision of the hospital's joint conference committee, affirmed by the hospital's managing board, was supported by substantial evidence in the record regarding the plaintiff's medical judgment and treatment, preformance of surgical procedures, and failure to complete hospital data, the court indicated that judicial review of the merits of internal hospital decisions is strictly limited and the court should not substitute its judgment for hospital agency judgment.

In support of his holding in **Duffield,** Judge Hall quoted at length from **Woodbury** v. **McKinnon**[9] an affirmance by the United States Court of Appeals for the Fifth Circuit of a district court's dismissal of a suit alleging the deprivation without due process of surgical privileges at a county hospital. Noting the holding that a doctor has no constitutional right to practice medicine in a private hospital, Judge Hall quoted with approval the circuit court's further holding in **Woodbury**:

> This court has repeatedly spoken to the broad discretion that must be given to the governing board of a hospital in setting the standards and in admitting physicians to its staff. Sosa v. Board of Managers of Val Verde Memorial Hospital, 437 F. 2d 173 (5th Cir. 1971). Judge Goldberg there placed in proper focus the restraint that must be exercised in judicial consideration of challenges to hospital administration.
>
> No court should substitute its evaluation of such matters for that of the Hospital Board. It is the Board, not the court, which is charged with the responsibility of providing a competent staff of doctors. The Board has chosen to rely on the advice of its Medical Staff, and the court cannot surrogate for the Staff in executing this responsibility. * * * The evaluation of professional proficiency of doctors is best left to the specialized expertise of their peers, subject only to limited judicial surveillance. The court is charged with the narrow responsibility of assuring that the qualifications imposed by the Board are reasonably related to the operation of the hospital and fairly administered. In short, so long as staff selections are administered with fairness, geared by a rationale compatible with hospital responsibility, and unencumbered with irrelevant considerations, a court should not interfere. Courts must not attempt to take on the escutcheon of Caduceus.[10]

Even before the decision of the United States District Court for the Southern District of West Virginia in **Duffield, supra,** and shortly after its decision in **Woodbury, supra,** the United States Court of Appeals for the Fifth Circuit had occasion to entertain a decision of the United States District Court for the Northern District of Texas squarely presenting the question of the discretion to be afforded a college or university in

the selection and evaluation of its professional employees, specifically its academic professional employees. In **Green** v. **Board of Regents of Texas Tech University,**[11] the United States District Court for the Northern District of Texas tried an action brought under 42 U.S.C. Sec. 1983 to seek redress for alleged sex dsicrimination directed at the plaintiff, Dr. Lola Beth Green, by Texas Tech University. Dr. Green, an associate professor of English at Texas Tech University and a member of the English Department faculty of that university for almost twenty-five years, had applied periodically for promotion to full professor and had been denied that promotion each time. Dr. Green alleged that these denials were based solely on the fact that she is a female and that the action of the university in denying her promotion was an example of a pattern or policy of the university of discrimination against women. Plaintiff's evidence of her professional competence and achievements as well as those of her male colleagues in the English Department who had been granted the rank of full professor was compared by the court to the testimony of the university's witnesses, including members of the Board of Regents, the President of the University, the Dean of the College of Education, the Vice President for Academic Affairs, and several of plaintiff's colleagues in the English Department. The court concluded that Dr. Green's candidacy for promotion to the rank of full professor was given as fair and impartial hearing as could have been required and concluded, importantly, that each of the university's witnesses, including one woman who was on a committee which reviewed plaintiff's application and who is herself a full professor, testified that the decision not to promote Dr. Green was based solely on the facts of plaintiff's record, with no thought being given to her sex. A review of the transcript of the trial in the district court indicates that the primary evidence submitted in support of the decision not to promote Dr. Green related to her lack of research and scholarly activity and her inability to attract students, especially graduate students, for direction of study.

Examining the necessity of a public institution's establishing objective criteria for the selection and evaluation of employees, including academic professional employees, the court held that the setting of standards which involve the judgment of professional peers does not invalidate the selection or evaluation process:

> Texas Tech University has established definite criteria for evaluating a person's eligibility for promotion in teaching rank. The criteria for promotion to full professor are especially exacting, as that is the highest faculty status which can be awarded by a university. The Court finds that these criteria are reasonable, that they bear a rational relationship to the duties of a full professor, and that they were reasonably applied in this case. They call for careful evaluation of (a) teaching ability, (b) publications and scholarly activity, and (c) service to the community and to the university. It is undisputed that such evaluations are necessarily judgmental, and the court will not substitute its judgment for the rational and well considered judgment of those possessing expertise in the field.[12]

Affirming the decision of the district court, the United States Court of Appeals for the Fifth Circuit held that plaintiff's allegations on appeal concerning the alleged failure of the university to establish definite criteria controlling promotions in teaching rank, the lower court's holding that the university had not acted capriciously and had not abused its discretion, and the court's requirement of direct noninferential evidence of discrimination against plaintiff personally all fell under the positive finding by the court below that Dr. Green's application for promotion was given fair and impartial treatment and the refusal of her promotion effected without any regard being given to her sex. Agreeing that discretion must be vested in the university in the evaluation of academic professional employees, the court of appeals held:

> The University's standards are matters of professional judgment, and here substantially every individual or committee in the institution's reviewing body questioned Dr. Green's competence.

The Fifth Circuit Court of Appeals has most recently affirmed its holding in **Green** in

Toups v. **Authement,**[13] where the court affirmed the decision of the United States District Court for the Eastern District of Louisiana dismissing the complaint of a public school teacher that her dismissal from her teaching position in the Lafourche Parrish School System was based upon her race, color, or sex.[14]

These decisions and similar decisions of the federal courts recognize the absolute necessity that any institution employing professional employees, including colleges and universities employing academic professional employees, must be vested with substantial discretion in the establishing of standards for the selection and evaluation of such employees and must be able to exercise judgment in the application of those standards or criteria to the selection or evaluation of a particular professional. Such discretion allows the college or university to apply the collective judgment of academic professionals to the evaluation of applicants for professional positions or candidates for promotion or tenure, even though the exercise of such judgment arguably introduces an element of subjectivity into the selection and evaluation process. Finally, and most important, it appears clear that the introduction of such judgmental factors does not per se demonstrate racial, ethnic, or sex bias so long as the judgment applied in the selection and evaluation process is directed at an examination of the professional competencies of the professional employee applicant or candidate for promotion or tenure. In this regard, although the college or university may not continue to insist upon the "best qualified" or "most qualified" academic professional employee or, in some instances, even upon the terminal degree requirement without risking noncompliance with affirmative action mandates under the executive order and applicable federal regulations, it may continue to insist upon certain standards in the areas of teaching, research, and service which must be met by an applicant for employment or a candidate for promotion, tenure, and the like, with the likelihood that the federal courts would be reluctant to interfere with such standards and would indeed be supportive of the university's right to determine such standards (and the relationship between the standards and successful performance in the position to which the standards are applied).

Applying this principal to the pursuit of affirmative action, it is equally apparent that the aforementioned holdings, although factually related to charges of employment discrimination, allow the college or university the opportunity to formulate criteria or standards for the selection and evaluation of professional employees, and particularly academic professionals, which recognize those qualities, in the judgment of the college or university, most relevant to its educational mission. Here there would appear little doubt that the university committed to the pursuit of an agressive affirmative action program may include within the criteria or standards for the selection and evaluation of professional employees factors which identify the broad range of skills and backgrounds from which the university should draw for the make-up of its academic professional community in order that this community reflect and impart to its diverse student population those experiences most valuable to a complete education and most apt to produce students whose skills upon exit from college are most predictive of successful occupational practice where needed most by the community at large.

It would further appear that, especially in light of the university's obligations to effect desegregation in higher education, the university's selection or promotion of academic and other professional employees could weight substantially those unique skills and backgrounds possessed by persons from groups historically underutilized by the university in its professional work force. For the public university, criteria may arguably include the identification of applicants or candidates for promotion with potential for making significant contributions to the community at large, directly, or through the training of students for service to the community, especially those communities historically denied needed medical, legal, social, business, and other services. Indeed, criteria may arguably include the university's commitment to produce a racially balanced work force and student body whose population, by race, sex, and otherwise, is similarly reflective of the population in general, as well as the interest of the university in increasing participation in the professions by racial, ethnic, or sex groups which have historically been denied access to such professions and which are grossly underrepresented within the professional communities.

The extent to which the establishment and application of such criteria will be approved by the courts is guided, in my opinion, only by decisions, as those discussed hereinabove, generally preserving the discretion of the university in selecting and evaluating professional and especially academic professional employees, and the decisions of the federal courts supporting the delegation of such discretion to other public institutions employing professional employees.

More definitive precedent might have been established had the United States Supreme Court decided **DeFunis** v. **Odegaard**[15] on its merits. Clearly the impact of the preferential student admissions program challenged in **DeFunis** is little different in impact from aggressive programs of affirmative action in employment. In **DeFunis** the Supreme Court of the State of Washington sitting **en banc** held constitutional procedures established by the University of Washington Law School to grant preferred admission to disadvantaged racial and ethnic minority applicants.[16] The procedures established by the University of Washington Law School for screening applicants for admission to the first year law class incorporated a separation of the applications of white male applicants from the applications of persons who were members of racial or ethnic minority classes. The application of a racial or ethnic minority applicant was compared with the application of other racial or ethnic minority applicants but not with applications from nonminority applicants. Further, the predicted first year average, computed on the basis of the applicant's undergraduate grade point average and score on the law school admission test, was not the determinative factor for admission of minority applicants as it was in considering the admission of most nonminority applicants. Finally, in addition to effecting a disparate influence of the predicted first year average on the admission of nonminority applicants, vis-a-vis racial and ethnic minority applicants, the law school's admission procedures established additional criteria applicable uniquely to minority applicants. These criteria included the identification of applicants with potential for making significant contributions to the community at large. These criteria were considered with the predicted first year average of racial and ethnic minority applicants along with recommendations for the admission. The admissions procedures included no established quotas in the determination of the admission of minority applicants, but minority students who would have been summarily denied admission had they been members of the class of nonminority applicants were admitted to the first year law class.

In upholding the law school's preferential admissions program, the Supreme Court of Washington held that a public university may grant special consideration to ethnic and racial minority applicants in its admissions procedures without violating the equal protection clause of the Fourteenth Amendment. In holding the preferential admissions procedures constitutional, the Washington Supreme Court relied heavily upon its interpretation of **Brown** v. **Board of Education,**[17] which the court held does not prohibit all racial classifications but rather prohibits only those which are invidious and which stigmatize a racial group. The court determined that subsequent decisions of the United States Supreme Court have made it clear that in some circumstances a racial criteria may be used--and indeed in some instances must be used--by public educational institutions in bringing about racial balance.

The court held that preferential programs such as the one in question could be consistent with constitutional mandates only where the school was able to carry the burden of proving that utilizing race as a factor in admissions was necessary to accomplish a compelling state interest. However, the court found this compelling state interest in the educational interest of the state in producing a racially balanced student body and in the compelling interest of the state to increase participation in the legal profession by racial and ethnic groups which have historically been denied access to the profession and which are grossly underrepresented within the legal community. Finding this compelling state interest, the court held that the preferential admissions program was consistent with the Constitution so long as admissions criteria were not arbitrary and capricious. In validating the criteria, the court held

that the criteria included the identification of applicants with potential for successful performance in law school and looked toward selection of those who would make significant contributions to the school and the community at large. In language analogous to that used by the courts in the employment discrimination cases discussed herein, the court specifically held that the departure from the predicted first year average based upon test score and grade point averages and the utilization of judgmental factors, including the weighting of admissions criteria differently for different applicants, does not, per se, make the action arbitrary and capricious.

It is important to note that the **DeFunis** case involved a direct challenge to a program of affirmative action--specifically, preferred admission. In approving the preferential admissions program, the Supreme Court of Washington applied directly the reasoning used by the federal courts in affirming decisions relative to the selection and evaluation of academic professional employees by colleges and universities--i.e., that crtieria used by the university may include judgmental factors and may involve a flexible application of these factors to different persons being sought by the institution (in the **DeFunis** case, applicants being sought for admission to study; in the situation advanced herein, applicants sought for employment or advancement within the organization). In the case of public institutions, it would appear that the educational interest of the state in producing racially balanced student bodies and the compelling interest of the state to increase participation in various professions by racial and ethnic groups which have historically been denied access to these professions and which are grossly underrepresented within the community of professions would seem to be an interest equally apparent in the university's role as employer.

Strong dissenting opinions were filed in **DeFunis,** the dissenters arguing primarily that in **Brown** v. **School Board** and similar cases cited by the majority, the issues involved the providing of equal educational opportunity and resulted in no denial of educational opportunity to either white or black students. The dissenters distinguished the facts in **DeFunis** on the ground that the minority admissions program established by the law school resulted in a deprivation of educational opportunity to the plaintiff and other white males rejected by the law school. A similar argument may be advanced to attack an affirmative action program which establishes criteria of the type discussed herein in the selection and evaluation of academic and other professionals and applies those criteria flexibly among different applicants or candidates for tenure or advancement within the organization. However, it should be noted that the thrust of the executive order itself and of the regulations promulgated by the Department of Health, Education, and Welfare governing affirmative action programs clearly establish a preference in the selection of employees. Such programs, like the University of Washington's admissions program, although not establishing quotas, have required the establishment of affirmative goals and objectives which include the achieving of racial, sex, and ethnic balances in employment through special recruitment of protected class persons. Further, the public universities' affirmative duty to dismantel dual systems of education [traditionally a more limited duty than is imposed upon elementary and secondary schools, **Green** v. **School Board,** 391 U. S. 430 (1968)] has recently been reemphasized by the United States District Court for the District of Columbia in **Adams** v. **Richardson,** 351 F. Supp. 636 (D. D.C. 1972, amended 1973). The **Adams** decision mandates the submission by twelve states of plans for the disestablishment of dual systems of higher education established upon historically racial grounds including within such plans projections for the integration of faculty among black and white universities.

Unfortunately, the United States Supreme Court dismissed **DeFunis** on appeal as moot.[18] Had the United States Supreme Court reversed the decision of the Washington Supreme Court in **DeFunis,** certainly the concept of affirmative action would have been severely limited and the effect of many affirmative action programs slowed. However, even a disapproval of the preferential program presented by **DeFunis** would not necessarily prevent the utilization of such standards and criteria for the selection of academic and other

professionals, as are herein advanced. Had the Supreme Court chosen to fault the University of Washington's preferential admissions program, its criticism might well have been directed toward the law school's application of different criteria to segregated classes of applicants. The court might well require the application of identical criteria to all applicants, although allowing and perhaps requiring that such criteria be designed so as to insure consideration of any applicant who might possess qualities predictive of successful performance. Such criteria could, under these circumstances, include the identification of unique skills and backgrounds which predict success in performance based upon the university's goals and objectives. And, importantly, the application of such criteria might well tend to select disadvantaged white or black, male or female applicants or candidates for advancement.[19]

The utilization of standards and criteria in the manner suggested for the selection and advancement of academic and other professionals employed by the college or university is not a program of quota hiring or advancement. Indeed, such programs are of questionable legality. The guidelines promulgated by the Department of Health, Education, and Welfare, pursuant to Executive Orders 11246 and 11375 indicate that the achievement of goals is not the sole measurement of a contractor's compliance but represents a primary threshold for determining a contractor's level of performance and whether an issue of compliance exists. If goals are not met because the number of employment openings was inaccurately estimated or because of changed employment market conditions or the unavailability of women and minorities with the specific qualifications needed but the record discloses that the contractor followed its affirmative action program, the guidelines suggest that the contractor has complied with the letter and spirit of the executive orders. The guidelines emphasize that while goals are required, **quotas are neither required nor permitted by the executive order. When used correctly, goals are an indicator of probable compliance and achievement, not a rigid or exclusive measure of performance.**[20]

In pertinent part, the guidelines further indicate:

> It is a violation of the Executive Order, however, for a prospective employer to state that only members of a particular minority group or sex will be considered. * * * In the area of academic appointments, a nondiscriminatory selection process does not mean that an institution should indulge in "reverse discrimination" or "preferential treatment" which leads to the selection of unqualified persons over qualified ones. Indeed to take such actions on grounds of race, ethnicity, sex or religion constitutes discrimination in violation of the Executive Order.[21]

The regulations promulgated under the executive order generally require such guidelines by providing in pertinent part:

> Sections 60–2.12***
> (e) Goals may not be rigid and inflexible quotas which must be met, but must be targets reasonably attainable by means of applying every good faith effort to make all aspects of the entire affirmative action program work.

Disapproval of rigid quotas has already been indicated by the United States Supreme Court. In **Griggs v. Duke Power Company, supra,**[22] the United States Supreme Court indicated:

> Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.[23]

Generally, the institution should not, in the establishing of standards and criteria advanced herein, find it necessary to rigidify numerical goals and objectives in the selection and advancement of academic and other professionals. Indeed, the institution should find it possible to attain affirmative action goals through the application of legitimate criteria in the manner suggested and, in my opinion, supported by the federal courts, through the rewarding of the efforts of those within the university community striving to achieve those goals.

Obviously, I have suggested that the judgment of the college or university in the selection and evaluation of academic and other professionals is, if reasonably applied, and related to the criteria suggested, subject to limited challenge or judicial review and is a matter generally committed by the courts to the sound discretion of the college or university. This discretion allows the university to employ the judgment of its professional community in the selection and evaluation of academic and other professionals without subjecting the university to claims that judgmental factors remove the necessary objectivity from criteria or standards which must be utilized in the application of such employment practices. Similarly, this flexibility allows the university the opportunity to effect the correction of historic underutilization of certain groups of persons within its professional work force through the exercise of the same judgmental factors and the application of flexible but objective criteria which identify those applicants for employment or candidates for advancement who predict success, defined to include the university's commitment to the recognition in its programs of the unique and diverse skills and backgrounds of all persons in the local, state, and national communities. This proposition suggests a twofold responsibility and right of the university most apparent to its legal counsel. That responsibility and right is to defend against unmeritorious allegations that the selection or evaluation of academic and other professionals by the university has been racially or sexually biased because of the exercise of judgment by university officials who may, in the main, be members of nonprotected classes. This right of the university does not, however, alter or affect the responsibility of the university to implement identical criteria and standards of the type herein discussed to meet the goals and objectives of an aggressive program of affirmative action, dedicated to correcting the historical underutilization of certain groups within its academic and other professional work force.

Certainly, there is a risk that the implementation of an aggressive affirmative action program will afford creative plaintiff's counsel opportunities for litigation alleging that the recognition by the college or university of the need for affirmative action and the defining of affirmative action goals and objectives demonstrates historical discrimination.[24] However, in my opinion, the implementation by the college or university of an approved affirmative action program will result in a recognition by the courts that no injunctive mandates should be imposed upon the college or university even if discrimination is apparent in certain situations. The approval of such an argument has already been indicated by the federal courts. In **Parham v. Southwestern Bell Telephone Company**[25] the United States Court of Appeals for the Eighth Circuit held:

> The company's record over the past three years is impressive and salutory. This court recognizes that the appellee has shown considerable progress under its affirmative action program adopted in 1968. The thrust of this program, in seeking minority group individuals for employment, tends to overcome the discrimination built into the previous recruitment system. The record also shows that the Company's management personnel have undertaken greater supervision and implementation of its employment policies and programs.
>
> In view of this evidence, we agree with the trial court that no injunction seems necessary or appropriate in this case at the present time. Title VII aims at securing voluntary compliance with the requirements for equal employment opportunities. In enacting the Civil Rights Act of 1964, Congress placed great emphasis on private settlement and the elimination of unfair practices without resorting to the court's injunctive powers.[26]

FOOTNOTES

1. 401 U. S. 424 (1971).

2. The responsibilities of private and public institutions, including institutions of higher education, are derived in part from different laws. State action--including activities regarding the employment of individuals--which results in the deprivation of those civil rights guaranteed by the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution is proscribed by constitutional mandate. Similarly, the Civil Rights Act of 1964, 42 U.S.C. Sec. 1983 **et seq.**, applies to action, taken under color of state law, which deprives an individual of his or her civil rights.

   The responsibilities of private institutions to fashion employment practices free of unlawful disparate impact are, on the other hand, derived primarily from specific federal statutes governing employment and proscribing unlawful employment practices, i.e., Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000(e) **et seq.** In March of 1972, Title VII of the Civil Rights Act of 1964 was amended to include public institutions of higher education within the definition of employers covered by the act.

3. Indeed, although as legal counsel to a major public university I have been involved in the development of a detailed affirmative action program, approved by the Office of Civil Rights, Department of Health, Education, and Welfare, my activities as legal counsel have consisted in greater measure of the representation of that institution in the defense of employment discrimination litigation in both federal and state courts.

4. 401 U. S. at 430–431.

5. Federal Regulations were revised on July 1, 1973, to remove the exemption for public institutions of higher education from the requirements for maintenance of written affirmative action programs.

6. The enforcement of the executive order and the responsibility for the promulgation of the aforementioned guidelines implementing the enforcement program under the executive order were given to the Office of Civil Rights, Department of Health, Education, and Welfare, by the United States Department of Labor, the department responsible under the terms of the executive order for its enforcement.

   The institution should be aware that, although there exists an unfortunate overlap in jurisdiction among several federal agencies, including the Department of Labor, the Department of Health, Education, and Welfare, and the Equal Employment Opportunity Commission in the enforcement of anti-discrimination laws, the enforcement of affirmative action mandates created solely by the executive order of the president is the responsibility of the Office of Civil Rights, Department of Health, Education, and Welfare. Thus, while other federal agencies may assert jurisdiction to review and/or approve institutional affirmative action programs, jurisdiction for the enforcement of the requirements of the executive order is vested solely in the Department of Labor and, by its delegation, in the Office of Civil Rights.

7. Higher Education Guidelines, Executive Order 11246, United States Department of Health, Education, and Welfare (October 1, 1972).

8. 361 F. Supp. 398 (S.D. W.Va. 1973).

9. 447 F. 2d 839 (5th Cir. 1971).

10. 447 F. 2d at 842–43.

11. 335 F. Supp. 249 (N.D. Tex. 1971).

12. 335 F. Supp. at 250.

13. No. 74–1527 (5th Cir. June 28, 1974).

14. See also **United States** v. **Board of Education of Lincoln Cty.**, Georgia, 469 F. 2d 1315 (5th Cir. 1972).

15. 507 P.2d 1169 (Wash. 1973), appeal dismissed ____ U. S. ____, 42 U.S.L.W. 4578 (1974).

16. **DeFunis** v. **Odegaard**, 507 P. 2d 1169 (Wash. 1973).

17. 347 U. S. 483.

18. _____ U. S. _____, 42 U.S.L.W. 4578 (1974).

19. The author's discussion of the reasoning of the **DeFunis** case has also been published in Chapter 17, Current Trends in School Law (The National Organization on Legal Problems of Education, 1974).

20. Higher Education Guidelines, **supra**, page 4.

21. Higher Education Guidelines, **supra**, pages 6, 8.

22. 401 U. S. 430–431.

23. Cases approving the establishing of quotas continue to involve issues of school desegreation or, in the area of employment, employers exempt from the requirements of the executive order, e.g., construction contractors.

24. This is especially true in light of recent holdings of certain of the federal courts regarding the scope of permissible discovery in employment discrimination cases. See, e.g., **Burns** v. **Thiokol Chemical Corp.**, 482 F. 2d 300 (5th Cir. 1973); **Huff** v. **N.D. Cass Company of Alabama**, 468 F. 2d 172 (5th Cir. 1972), modified on appeal 485 F. 2d 710 (5th Cir., **en banc** 1973).

25. 433 F. 2d 421 (8th Cir. 1970).

26. 433 F. 2d at 429.

AFFIRMATIVE ACTION:

FEDERAL LAWS AND REGULATIONS RELATING TO STUDENTS

DeFunis and Title XI

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In 1954 the Supreme Court of the United States proclaimed public education "a right which must be made available to all on equal terms."[1] The ruling held unconstitutional public schools segregated by race and initiated affirmative action in education.

In the twenty years since **Brown** v. **Board of Education of Topeka**[2] it has been firmly and clearly established that educational institutions receiving federal financial assistance may not deny admission on the basis of race, color, or national origin.[3] Not yet clear, however, are the answers to two questions that have arisen out of **Brown** and are, probably, the major issues today in the area of student affirmative action.

The first is the "reverse discrimination" question raised in **DeFunis** v. **Odegaard**.[4] To obtain racial balance may an educational institution constitutionally admit minority students who are less qualified academically than rejected non-minority candidates? Secondly, what is the impact of federal legislation banning discrimination against students on the basis of sex? I would like to look at these two questions and consider possible answers.

Sixteen hundred and one persons applied for the 150 places in the University of Washington Law School's fall of 1971 first-year class. One of the applicants was Marco DeFunis, Jr., a white Phi Beta Kappa. According to the law school's admission policy, "The objectives of the admissions program are to select and admit those applicants who have the best prospect of high quality academic work at the law school, and, in the minority admissions program described below, the further objective therein stated." The policy explains that primary importance is placed on the undergraduate grade point average and performance on the Law School Admission Test (LSAT). However, in certain "truly exceptional" cases other factors such as the difficulty of the applicant's undergraduate program and his success in post-college endeavors are taken into consideration. "Truly exceptional" is defined in the policy as a case "in which the numerical indicators clearly appear to be an inaccurate measure of academic potential."

The policy further states that:

> Because certain ethnic groups in our society have historically been limited in their access to the legal profession and because the resulting under-representation can affect the quality of legal services available to members of such groups, as well as limit their opportunity for full participation in the governance of our communities, the faculty recognizes a special obligation in its admissions policy to contribute to the solution of the problem.
>
> Qualified minority applicants are therefore admitted under the minority admissions

program in such number that the entering class will have a reasonable proportion of minority persons. . . . Under the minority admissions program, admission is offered to those applicants who have a reasonable prospect of academic success at the law school, determined in each case by considering the numerical indicators along with listed factors. . . .

No particular internal percentage or proportion among various minority groups in the entering class is specified; rather, the law school strives for a reasonable internal balance given the particular makeup of each year's applicant population.[5]

Prior to the actual screening of applications, the law school calculated a predicted first year average by using a formula based of LSAT scores and grades in the last two years of college. Past experience indicated that applicants with an average above 77 had outstanding potential and those with an average below 74.5 had little chance of success.

The school then separated the minority (defined by them as black, chicano, American Indian, or Filipino) applicants from the non-minority ones. Applications from the non-minority group were considered in the following manner: the school quickly accepted a number of the over-77 applicants; the Chairman of the Admissions Committee reviewed the applications from persons with averages under 74.5 and rejected most of them; he then sent to the committee the few under-74.5 applications he felt merited further consideration, the few over-77 applications that had not been summarily accepted, and the large number of applications from candidates averaging between 74.5 and 77. DeFunis's average was 76.23. The applications were randomly distributed to the committee members and considered competitively.

The procedure was different for the minority applicants. None of these candidates could be summarily rejected by the chairman, regardless of average. Their applications were not randomly distributed to the committee members. Rather, all applications from blacks were considered by a black law student and a professor who previously worked with disadvantaged college students considering law school. The chicano, American Indian, and Filipino applications were considered by an assistant dean. The minority applications were compared with each other only, never with those in the non-minority group. By using this process, "the Committee sought to find 'within the minority category, those persons who we thought had the highest probability of succeeding in law school.' "[6]

When all the aceptances were sent out for the fall of 1971 first-year class, all applicants with averages over 78 and 93 of the 105 applicants with averages between 77 and 78 had been accepted. Thirty-seven minority candidates were accepted; thirty of them had predicted first year averages below 74.5. Six of the remaining seven had averages below that of DeFunis. Forty-eight non-minority applicants with averages below DeFunis's were also admitted; of these, twenty-three were returning veterans who had been admitted previously. DeFunis was placed in the bottom quarter of the waiting list and was eventually rejected.

Marco DeFunis sued the university, alleging the procedures and criteria employed by the law school invidiously discriminated against him on account of his race in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. He sought a mandatory injunction ordering the school to admit him as a member of the 1971 entering class. The trial court held the denial of his application unconstitutional and ordered him admitted.

On appeal, the Supreme Court of Washington considered "whether race can ever be considered as one factor in the admissions policy of a state law school or whether classifications are per se unconstitutional because the equal protection of the laws requires that law school admissions be 'color blind'; [and] if consideration of race is not per se unconstitutional, what is the appropriate standard of review to be applied in determining the constitutionality of such a classification?"[7]

The court found that race can be considered by an admissions committee "where the purpose is to bring together, rather than separate, the races."[8] The only racial classifications that are per se unconstitutional under **Brown,** the majority said, are "invidious racial classiciations––i.e., those that stigmatize a racial group with the stamp of inferiority."[9]

The racial classification used by the University of Washington Law School Admissions Committee is constitutional, said the court, if it meets a two-fold test. First, the state must show a compelling state interest; second, it must "show the requisite connection between the racial classification employed and that interest."[10] The test was met in **DeFunis,** the court said, "because racial imbalance in the law school and the legal profession is the evil to be corrected, and it can only be corrected by providing legal education to those minority groups which have been previously deprived."[11]

DeFunis petitioned the Supreme Court of the United States for a writ of certiorari. It was granted,[12] and oral argument was heard on February 24, 1974. Unfortunately, two months later the Court decided it would not rule on the merits inasmuch as DeFunis was about to graduate from law school.[13]

Dissenting from the majority's decision to abstain from considering the merits, Mr. Justice Brennan said, "The Court clearly disserves the public interest. The constitutional issues which are avoided today concern vast numbers of people, organizations and colleges and universities, as evidenced by the filing of twenty-six amici curiae briefs. Few constitutional questions in recent history have stirred as much debate, and they will not disappear. They must inevitably return to the federal courts and ultimately again to this Court."[14]

When the Court finally responds, what will it say? Will it hold that the same Constitution that initiated affirmative action in minority admissions invalidates affirmative action as discriminating against non-minority applicants? Probably not. Will it hold unconstitutional education's traditional method of using subjective as well as objective criteria in selecting students? Hopefully not. Will it destroy the concept that success is based on ability, not color? I doubt it. No one knows what the Court will hold. Speculation is helpful, however, for the answer will have a tremendous impact on the admissions policies of your institutions.

If the University of Washington Law School's method of accepting students is ultimately found to be unconstitutional, it will probably be because the school used two totally different methods of selecting students depending upon race. I do not believe the selection process will be held unconstitutional because the school accepted minority applicants with less impressive academic credentials than rejected non-minority candidates in order to achieve an integrated student body.

Colleges have traditionally applied subjective criteria in admitting students and have never selected only those with the highest academic records. To obtain balance and diversity, schools have selected less academically qualified students with special talents, in sports or music, for example. Schools have accepted students from other states or countries for their ability to offer to the total student body something a local student with more impressive academic credentials cannot offer. Just as valid, I feel, is a consideration of race and background in formulating a total student body.

The answer appears to be one standard of admission that relies little on objective criteria and heavily on subjective matters. The selection process would be much more difficult for administrators, but the result would be a diversified student body selected in a uniform manner. Properly carried out, it would insure affirmative action without subjecting the institution to as great a risk of "reverse discrimination" charges. It would give underprivileged whites with potential the same opportunities as are now given similarly-situated members of minority races. And it would uphold the institution's right to subjectively select its student body.

I foresee more litigation in this area until the **DeFunis** question is finally answered by the Supreme Court of the United States. I suggest that the appropriate persons in your institution join with your university attorneys and look at your admissions policies in light of the **DeFunis** issue. It presents a real opportunity for creativity in an attempt to maintain a viable affirmative action program that is devoid of any discrimination charges.

Now I would like to turn to the second area of student affirmative action in higher education that will profoundly affect your institutions in the coming years--the elimination of discrimination based on sex.

On July 1, 1972, Title IX of the Education Amendments of 1972 became law.[15] It provides, with certain enumerated exceptions, that:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . .[16]

Totally excluded from Title IX are educational institutions controlled by religious organizations if its application "would not be consistent with the religious tenets of such organization"[17] and institutions "whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine."[18]

Insofar as the law applies to admissions, it applies "only to institutions of vocational education, professional education, and graduate higher education, and public institutions of undergraduate higher education."[19] Private institutions of undergraduate higher education, therefore, are still legally permitted to restrict admission on the basis of sex and receive federal funds. Also still permitted to restrict admission on the basis of sex is "any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex."[20] If private institutions of undergraduate education and "traditionally and continually" single-sex institutions of undergraduate higher education do accept both male and female students, the law's prohibition against discrimination on the basis of sex applies in all other areas of college life, since the exclusion is limited to admissions.

Title IX's language is potentially all-encompassing. It prohibits discrimination on the basis of sex without setting forth any guidelines or limitations. This was Congress's intent. It left the law's specific meaning up to those federal agencies that give financial assistance to educational institutions. By statute they have the right to "promulgate rules and regulations to help achieve its objectives"; such rules and regulations have the effect of law when approved by the president.[21]

On June 18, 1974, the Secretary of the Department of Health, Education, and Welfare released HEW's proposed regulations "to effectuate Title IX of the Education Amendments of 1972." These regulations will have a profound effect on virtually every educational institution in this country. According to the secretary, comments, suggestions, and objections may be submitted to the Director of the Office of Civil Rights in Washington through October 15. I urge each of you to study the proposed regulations, discuss them with others at your institutions, and submit comments.

For the remainder of my time today, I shall go through the first four subparts of the proposed regulations and comment on those portions which should elicit the most discussion and concern. I shall not discuss Subpart E, which deals with discrimination on the basis of sex in employment in education programs and activities, and Subpart F, which outlines enforcement procedures.

Subpart A contains definitions. Several are especially noteworthy. Title IX, you remember, limits its sex discrimination prohibition to educational programs or activities receiving "Federal financial assistance." The regulations define such assistance broadly, including not only grants and loans for scholarship or construction, but also:

A grant of Federal real or personal property or any interest therein, including surplus property, and the proceeds of the sale or transfer of such property, if the Federal share of the fair market value of the property is not, upon such sale or transfer, properly accounted for to the Federal Government.

Provision of the services of Federal personnel.

Sale or lease of Federal property or any interest therein at nominal consideration, or at consideration reduced for the purpose of assisting the recipient or in recognition of public interest to be served thereby, or permission to use Federal property or any interest therein without consideration.

Any other contract, agreement, or arrangement which has as one of its purposes the provision of assistance to any education program or activity, except a contract or insurance or guaranty.[22]

Very few educational institutions will not receive some "Federal financial assistance" as defined in this provision.

The second definition I would like to mention is that of "administratively separate unit." Title IX defines "educational institution" as:

> Any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each school, college, or department.[23]

The proposed regulations state:

> **"Administratively separate unit"** means a school, department or college of an educational institution . . . admission to which is independent of admission to any other component of such institution.[24]

In other words, if your university is made up of an undergraduate school, a law school, a medical school, and a graduate school, all with autonomous admissions systems, each school is a separate "educational institution" for purposes of this law. If one school receives no federal financial assistance as defined by the regulations, it may discriminate on the basis of sex without violating the regulations and without jeopardizing the other three. Because the regulation prohibiting discrimination in admissions excludes private undergraduate institutions, if the university in the example is a private university, it may maintain a single-sex admissions policy in the undergraduate school without violating the law so long as its graduate schools have open admissions policies.[25]

Subpart B lists those institutions excluded from the regulations by virtue of Title IX's language.[26] In addition, it describes transition plans to be used by traditionally single-sex institutions that are beginning to admit students of the opposite sex.[27]

The substance of the regulations begins with the next subpart, Subpart C, which prohibits discrimination on the basis of sex in admission and recruitment. The "admission" provision provides that:

> No person shall, on the basis of sex, be denied admission, or be subjected to discrimination in admission, by any recipient to which this subpart applies. . . .[28]

In addition, the provision specifically provides that educational institutions covered by the regulations may not:

> Give preference to one person over another on the basis of sex, by ranking applicants separately on such basis, or otherwise;
>
> Apply numerical limitations upon the number of proportion of persons of either sex who may be admitted; or
>
> Otherwise treat one individual differently from another on the basis of sex.[29]

This section is especially interesting in light of our earlier **DeFunis** discussion. It expressly prohibits classifications on the basis of sex while the Supreme Court of Washington permits such classifications on the basis of race where the purpose is to admit to the institution a previously discriminated-against group. This regulation appears to prohibit sexual classifications even if their purpose is to give sexual "balance" to the class.

The proposed regulations also prohibit the use of any "rule concerning the actual or potential parental, family, or marital status of a student or applicant which treats persons differently on the basis of sex."[30] They prohibit any discrimination against a woman who is pregnant or has a pregnancy-related infirmity.[31] They prohibit:

> Pre-admission inquiry as to the marital status of an applicant for admission, including whether such applicant is "Ms.," "Miss," or "Mrs." A recipient may make pre-admission inquiry as to the sex of an applicant for admission, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by this part.[32]

In recruiting, the institutions must "make comparable efforts to recruit members of each sex."[33] In addition, they may be required to "take such remedial action as is necessary to overcome the effects of . . . previous discrimination"[34] or lack of participation by members of one sex. When recruiting, institutions may "not recruit primarily or exclusively at educational institutions, schools or entities which admit as students only or predominantly members of one sex, if such actions have the effect of discriminating on the basis of sex."[35]

Subpart D prohibits discrimination on the basis of sex in education programs and activities. It provides that:

> No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives or benefits from Federal financial assistance.[36]

In addition to prohibiting discrimination by the educational institution, the section prohibits discrimination in programs not operated by the institution but required by the institution or made a part of the institution's educational programs or activities--for example, educational consortia, cooperative education, and student teaching assignments.[37] According to the proposed regulations, institutions:

> Shall develop and implement a procedure designed to ensure that the operator or sponsor of such other educational program or activity takes no action affecting any applicant, student, or employee of such recipient which this part would prohibit such recipient from taking; and
>
> Shall not facilitate, require, permit, or consider such participation if such action occurs.[38]

The proposed regulations also forbid "assisting any agency, organization or person which discriminates on the basis of sex in providing any aid, benefit, or service to students or employees."[39] This section could prohibit any institutional assistance to sororities or fraternities or single-sex community groups. The important question here is the meaning of "assistance." Is it use of university space for organizational functions? Could it be university "registration" of sororities and fraternities as official campus organizations? Is it a lease of facilities at something less than a truly fair market price?

The secretary in his comments accompanying the proposed regulations attempted to help answer the question. He said:

> This section might apply, for example, to financial support by the recipient to a community recreational group or to official institutional sanction of a professional or social organization. Among the criteria to be considered in each case are the substantiality of

> the relationship between the recipient subject to the regulation and the other party involved, including the financial support by the recipient, and whether the other party's activities relate so closely to the recipient's educational program or activity, or to students or employees in that program, that they fairly should be considered as activities of the recipient itself.[40]

If this provision is approved as now written, it probably will be necessary to evaluate each request for use of university facilities or services or for university recognition on an ad hoc basis. You will need to look carefully at what the institution is providing the organization, monetarily or in facilities or services. Also apparently important to the secretary is the composition of the organization. The last sentence in the above-quoted comment indicates that less support may bring the organization within the provision's prohibition where the organization is composed of university-related persons (i.e., faculty, staff and students). It may be possible under this rule to allow a single-sex little league team to use your baseball diamond or a Rotary Club group to use your ballroom; such use by the American Association of University Women might be prohibited, however. If you do decide to let certain single-sex organizations use your facilities, I strongly suggest that you charge a fair rental fee.

Because they are composed of students, whether you will be able to recognize or register Greek organizations is a difficult question. The answer will probably depend in part upon what "registration" or "recognition" entitles an organization to at your institution. If it is free use of University space and services and an opportunity to receive a portion of student activity fees, the provision will probably disallow the recognition or registration. You may need to change your recognition and registration policies.

Clearly forbidden under the policy, it seems, will be the leasing of university housing to Greek organizations at less than a truly fair market value. And even that may not be permitted if the Greek facilities are superior to those available to other students.

It is interesting to note that these guidelines seem to forget that with sex--unlike race--there are legitimate areas of discrimination--in music or health services, for example. Instead of disbanding your women's glee club and men's chorus, or your Women's Problem Pregnancy Center, I suggest you may maintain close contact with such groups by making them, for example, "glee clubs for soprano and alto voices" and "choruses for bass and tenor music." Make sure you admit without regard to sex anyone who can qualify by adequately singing the music. Likewise, your center to assist women with pregnancy-related problems must assist any man with a problem that the center was set up to handle.

In the area of housing, the proposed regulations prohibit the imposition of different rules, regulations, fees, requirements, services, or benefits for men and women,[41] except that separate housing may be provided on the basis of sex.[42] Where different housing is provided men and women, it must be "proportionate in quantity to the number of students of that sex applying for such housing and comparable in quality and cost to the student."[43] Where the institution has an off-campus housing program that solicits, lists, approves, or in any other way helps make off-campus housing available to the students, the institution "shall take such action as may be necessary to ensure that such housing as is provided to students of one sex, when compared to that provided to students of the other sex, is as a whole: (i) proportionate in quantity and (ii) comparable in quality and cost to the student."[44] The housing regulation raises unanswered questions. Will it be illegal for one sex to have the newer facilities? Must all facilities be identical? The answers may be expensive ones for your institutions.

This regulation will prohibit different curfew hours for men and women.[45] Courts have in the past upheld different hours when colleges have shown a valid justification for them.[46] This will no longer be permitted.

It will render invalid discriminatory in-state tuition rules giving resident status for tuition purposes to the wife of a state resident but not to the husband

of a state resident. It will mean the end of rules making women, but not men, live on campus.[48] The regulations permit "separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be compared to students of the other sex."[49]

Students must have access to all education programs and activities regardless of sex. This includes "health, physical education, industrial, business, vocational, technical, home economics, music, and adult education."[50] Do not forget that the proposed regulations will apply in all probability to your university schools, too. Forbidden will be junior high school requirements of "home economics for girls while boys must take shop."

The regulations have not dealt with the question of "sex stereotyping in curricula and educational materials." According to the secretary, "the Department has concluded that specific regulatory provisions in this area would raise grave constitutional problems concerning the right of free speech under the First Amendment to the Constitution."[51] They have, however, dealt with appraisal and counseling materials and provide that an institution "which uses testing or other materials for appraising or counseling students shall not use different materials for different students on the basis of their sex or use materials which permit or require different treatment of students on such basis."[52]

In the area of financial and employment assistance to students, the proposed regulations prohibit any discrimination on the basis of sex, including having different amounts or types of assistance for men and women, limiting eligibility, or applying different criteria.[53] A subsection to this provision which may be controversial, and on which the secretary has specifically requested comment, prohibits:

> Through solicitation, listing, approval, provision of facilities, or other services assisting any foundation, trust, agency, organization, or person which provides assistance to any of such recipient's students in a manner which discriminates on the basis of sex.[54]

This section will render invalid all gifts earmarked to provide scholarship assistance to a member of one sex. I suggest that you discuss the potential impact of this section with your directors of development and inform the Director of the Office of Civil Rights if you foresee any problems. If this provision does become law, you will not necessarily lose all of your sex-restricted gifts, but you will probably have to bear the expense of going to court to have the gift instrument modified to remove the restriction. And of course you will run the risk of having the court declare the entire gift void. The regulations could, perhaps, be changed to permit sexually restricted gifts so long as the entire pool of money available to men and women is equal.

There is one exception to the broad prohibition against male-female delineation when giving financial assistance to students "Separate financial assistance for members of each sex may be provided as part of separate athletic teams for members of each sex to the extent consistent with [the regulation regarding athletic teams]."[55]

When assisting students in obtaining employment, institutions "shall take such action as may be necessary to assure such employment is made available without discrimination on the basis of sex, and shall not render such services to any agency, organization, or person which discriminates on the basis of sex in so making available such employment."[56] Here, as in other parts of the regulations, the institution has the burden of insuring a lack of sex discrimination in non-university related organizations.

The proposed regulations prohibit the providing of a medical, hospital, accident, or like insurance benefit, service, policy, or plan to any student which discriminates on the basis of sex.[57] It would seem that such policies must treat pregnancy and its related problems as they treat any temporary disease. If this becomes law, I advise you to look at the group medical insurance policies sanctioned by your institutions and made available to students. (While you are at it, check on your faculty and staff policies, too.) Many treat pregnancy and its related problems differently from other illnesses. For example, I am familiar

with one well-known policy which disallows any pregnancy-related claim made within 270 days from the starting date of the policy. It does not exclude claims for other illnesses an insured may have had on the policy's commencement date. Also, check your health centers to make sure women's medical problems receive the same attention as any other illness. If you are providing birth control devices for women, you should make them available for men, also. When dealing with pregnant students, the regulations prohibit schools from discriminating:

> Against any student, or exclud[ing] any student from its education program or activity, including any class or extra-curricular activity on the basis of such student's pregnancy, childbirth, false pregnancy, miscarriage, abortion, or recovery therefrom, unless:
>
> (i) the student requests voluntarily to participate in a different such program or activity; or
>
> (ii) the student's physician certifies to the recipient that such different participation is necessary for her physical, mental, or emotional well being.[58]

I can foresee a case of potential institutional liability where a pregnant student or an unborn child is injured due to a rigorous course. When a pregnant woman enrolls in a strenuous course, I suggest warning her of the potential danger. If your school has no temporary disability policy for its students, you will be required to "treat pregnancy as a justification for a leave of absence for a reasonable period of time, at the conclusion of which the student shall be reinstated to her original status."[59]

The last section in this Subpart is the one that has already received a great deal of publicity. It is the provision regarding athletics. The proposed regulation provides:

> No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of [or] be treated differently from another person or otherwise be discriminated against in any physical education or athletic program operated by a recipient, and no recipient shall provide any physical education or athletic program separately on such basis; provided, however, that a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill.[60]

What does it mean? Clearly, it seems to mean sexually integrated physical education classes, identical physical education requirements, and open athletic facilities. It also means that you may have women on your football, basketball, and baseball teams. The regulation requires that women be given the opportunity to try out for such teams, and if they are qualified, they must be accepted. Courts have already held that qualified women must be accepted for non-contact sport teams where there is no female team.[61] The proposed regulation, however, does not mean that you must have a certain number of women on these teams.

According to the proposed regulation, institutions "shall determine at least annually, using a method to be selected by the [institution] which is acceptable to the Director [of the Office of Civil Rights], in which sports members of each sex would desire to compete."[62] In other words, if enough persons of both sexes desire to participate in a certain sport, two teams must be fielded, one male and one female.

You may, therefore, continue with your football, basketball, and baseball teams; however, if women wish to play, they have a right to try out. If enough women want to play, you must establish a separate team for them. And when you do have two separate teams you may "not discriminate on the basis of sex in the provision of necessary equipment or supplies for each team, or in any other manner."[63] In other words, equipment for the women must be of the same quality as that for men. Facilities, special services, schedules—all must be equal. The women's football team may

not have the practice field daily from 6:00 to 6:30 a.m. while the men's team has it from 3:00 to 5:00 in the afternoon. The women's tennis team may not get the men's used racquets and balls. If men have training tables, women should have training tables.

The only area in which the proposed regulations permit a difference is in funding. You do not need to fund a million dollar female football team. The regulations provide that "nothing in this Section shall be interpreted to require equal aggregate expenditures for athletics for members of each sex."[64]

Finally, the athletics section contains affirmative action provisions requiring an institution:

> . . . with regard to members of a sex for which athletic opportunities previously have been limited, [to] make affirmative efforts to:
>
> (1) inform members of such sex of the availability for them of athletic opportunities equal to those available for members of the other sex and of the nature of those opportunities, and
>
> (2) provide support and training activities for members of such sex designed to improve and expand their capabilities and interest to participate in such opportunities.[65]

In addition, an institution "which operates or sponsors athletics shall make affirmative efforts to provide athletic opportunities in such sports and through such teams as will most effectively equalize such opportunities for members of both sexes. . . ."[66]

Do not forget that these regulations are still only "proposed." I hope all educational institutions will appoint committees to study them seriously. You are fortunate to have an opportunity to help formulate the final regulations.

In summary, let me emphasize that affirmative action is here in the student area. It is imperative that all educational institutions be aware of their responsibilities and begin to reach decisions on how to implement their own affirmative action programs within the legal guidelines established by courts, Congress, and federal agencies.

FOOTNOTES

1. **Brown** v. **Board of Education of Topeka,** 347 U. S. 483, 493 (1954).
2. 347 U. S. 483.
3. For example, 42 U.S.C. § 2000d.
4. 82 Wash. 2d 11, 507 P.2d 1169 (1973), vacated as moot, 94 S.Ct. 1704 (1974).
5. **DeFunis** v. **Odegaard,** 94 S.Ct. at 1720–1721 (dissenting opinion).
6. **DeFunis** v. **Odegaard.**
7. **DeFunis** v. **Odegaard,** 507 P.2d at 1178.
8. **Id.** at 1181.
9. **Id.** at 1179.
10. **Id.** at 1184.
11. **Id.**
12. **DeFunis** v. **Odegaard,** 94 S.Ct. 538 (1973).
13. 94 S.Ct. 1704.
14. **Id.** at 1722.
15. 20 U.S.C. §§1681 **et seq.**
16. **Id.** §1681(a).
17. **Id.** §1681(a)(3).
18. **Id.** §1681(a)(4).
19. **Id.** §1681(a)(1).
20. **Id.** §1681(a)(5).
21. 20 U.S.C. §1682.
22. Proposed HEW Reg. § 86.2(g), 39 Fed. Reg. 22232 (1974).
23. 20 U.S.C. § 1681(c).

24. Proposed HEW Reg. §86.2(0), 39 Fed. Reg. 22233.

25. See Secretary's comments, 39 Fed. Reg. 22228.

26. Proposed HEW Reg. §§86.12–14, 39 Fed. Reg. 22234.

27. Proposed HEW Reg. §§86.15–16, 39 Fed. Reg. 22234.

28. Proposed HEW Reg. § 86.21(a), 39 Fed. Reg. 22234.

29. Proposed HEW Reg. §86.21(b), 39 Fed. Reg. 22234.

30. Proposed HEW Reg. §86.21(c)(1), 39 Fed. Reg. 22234.

31. Proposed HEW Reg. §86.21(c)(2), 39 Fed. Reg. 22234–5.

32. Proposed HEW Reg. §86.21(c)(4), 39 Fed. Reg. 22235.

33. Proposed HEW Reg. §86.23(a), 39 Fed. Reg. 22235.

34. **Id.**

35. Proposed HEW Reg. §86.23(b), 39 Fed. Reg. 22235.

36. Proposed HEW Reg. §86.31(a), 39 Fed. Reg. 22235.

37. Proposed HEW Reg. §86.31(c), 39 Fed. Reg. 22235.

38. Proposed HEW Reg. §86.31(c)(2), 39 Fed. Reg. 22235.

39. Proposed HEW Reg. §86.31(b)(7), 39 Fed. Reg. 22235.

40. 39 Fed. Reg. 22229.

41. Proposed HEW Reg. §86.32(a), 39 Fed. Reg. 22235.

42. Proposed HEW Reg. § 86.32(b)(1), 39 Fed. Reg. 22235.

43. Proposed HEW Reg. §86.32(b)(2), 39 Fed. Reg. 22235.

44. Proposed HEW Reg. §86.32(c)(2), 39 Fed. Reg. 22235.

45. Proposed HEW Reg. §86.31(b)(4).

46. **Robinson** v. **Board of Regents, Eastern Kentucky University,** 475 F.2d 707 (6th Cir. 1973) (U. S. appeal pending).

47. Proposed HEW Reg. §86.31(b)(6), 39 Fed. Reg. 22235; see also Secretary's comments, 39 Fed. Reg. 22229.

48. Proposed HEW Reg. §86.32(a), 39 Fed. Reg. 22235.

49. Proposed HEW Reg. §86.33, 39 Fed. Reg. 22235.

50. Proposed HEW Reg. §86.34(a), 39 Fed. Reg. 22235.

51. 39 Fed. Reg. 22230.

52. Proposed HEW Reg. §86.34(c), 39 Fed. Reg. 22235.

53. Proposed HEW Reg. §86.35, 39 Fed. Reg. 22236.

54. **Id.** at (a)(ii).

55. Proposed HEW Reg. §86.35(c), 39 Fed. Reg. 22236.

56. Proposed HEW Reg. §86.35(b), 39 Fed. Reg. 22236.

57. Proposed HEW Reg. §86.36, 39 Fed. Reg. 22236.

58. Proposed HEW Reg. §86.37(b)(1), 39 Fed. Reg. 22236.

59. Proposed HEW Reg. §86.37(b)(3), 39 Fed. Reg. 22236.

60. Proposed HEW Reg. §86.38(a), 39 Fed. Reg. 22236.

61. **Brenden** v. **Independent School District** 742, 477 F.2d 1292 (8th Cir. 1973).

62. Proposed HEW Reg. §86.38(b), 39 Fed. Reg. 22236.

63. Proposed HEW Reg. §86.38(e), 39 Fed. Reg. 22236.

64. Proposed HEW Reg. §86.38(f), 39 Fed. Reg. 22236.

65. Proposed HEW Reg. §86.38(c), 39 Fed. Reg. 22236.

66. Proposed HEW Reg. §86.38(d), 39 Fed. Reg. 22236.

Proceedings of this conference prepared by

Editorial Services, Department of Conferences
The University of Georgia Center for Continuing Education
Athens